Supreme Court, U.S.
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Case No. 091503 JUN 7 - 2010

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Supreme Court of the United States

THE CADLE COMPANY, *et al.*,

Petitioners,

v.

KERRY R. HICKS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Were Petitioners improperly required to arbitrate a dispute that arose after the expiration of a contract, which did not have its source in that contract, because the lower courts disregarded this Court's controlling precedent for analyzing the arbitrability of postexpiration disputes—a precedent that has caused substantial confusion and a sharp split among the circuits?

2. Did the Court of Appeals: (a) fail to honor the foundational principle of the Federal Arbitration Act—that arbitration is a matter of consent—a principle which this Court forcefully reaffirmed in a recent decision; and (b) improperly rely on inapposite doctrines as grounds for the enforcement of an arbitration award against nonconsenting parties?

LIST OF PARTIES

The following were parties to the proceedings in the United States Court of Appeals for the Tenth Circuit, and they are also the parties to this certiorari petition:

1. Petitioner The Cadle Company, Defendant-Appellant below.
2. Petitioner Buckeye Retirement Co., LLC, Ltd., Defendant-Appellant below.
3. Petitioner William E. Shaulis, Defendant-Appellant below.
4. Petitioner Daniel C. Cadle, Defendant-Appellant below.
5. Respondent Kerry R. Hicks, Plaintiff-Appellee below.

STATEMENT REQUIRED BY RULE 29.6

There is no parent corporation or publicly held corporation owning 10% or more of the stock of Petitioner The Cadle Company or Petitioner Buckeye Retirement Co., LLC, Ltd.

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OPINIONS BELOW

The opinion of the Tenth Circuit Court of Appeals is available at 355 Fed. App'x 186 and reprinted in the appendix to this petition ("App.") at 1a-24a. The opinion of the United States District Court for the District of Colorado is available at 2008 WL 2900934 and reprinted at App. 25a-49a.

JURISDICTION

The opinion of the Tenth Circuit Court of Appeals was entered on December 7, 2009. App. 1a. The Tenth Circuit denied a timely petition for panel rehearing and en banc rehearing filed by Petitioners The Cadle Company, Buckeye Retirement Co., LLC, Ltd., and William Shaulis on January 7, 2010; the Tenth Circuit also denied a timely petition for rehearing and en banc rehearing filed by Petitioner Daniel Cadle on February 8, 2010. App. 86a, 88a. On March 2, 2010 and April 29, 2010, Justice Sotomayor signed orders extending the time to file this petition for a writ of certiorari to June 7, 2010 in Application Nos. 09A792 and 09A1040. The jurisdiction of this Court is invoked in a timely manner under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the scope of an arbitrator's jurisdiction under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.* The FAA provides, *inter alia*:

> In any of the following cases the United States court in and for the district wherein the award was made may

> make an order vacating the award upon the application of any party to the arbitration—
>
> . . .
>
> where the arbitrators exceeded their powers . . . .

9 U.S.C. § 10(a)(4).

Another relevant section of the FAA provides:

> A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2.

Further, Section 4 of the FAA provides:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition [the] district court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement.

9 U.S.C. § 4.

STATEMENT OF THE CASE

This Court has repeatedly emphasized that arbitration is a matter of consent, and that courts must honor the parties' contractual expectations when analyzing questions of arbitrability. Yet, in the decision below, the Tenth Circuit enforced a nearly $2 million arbitration award against Petitioners, including nearly $1 million in punitive damages, even though none of the Petitioners agreed to arbitrate the underlying dispute. In fact, neither individual Petitioner, Daniel Cadle or William Shaulis, was ever party to any arbitration agreement or consented to arbitrate claims against him individually. The Court of Appeals based its decision on the existence of an arbitration clause in a promissory note signed by Respondent that one of the Petitioners had once held. But neither the Respondent, nor any of the Petitioners, was a party to that note when the events giving rise to this dispute occurred. Nor does this dispute require interpretation of, or otherwise arise under, that promissory note.

The Tenth Circuit's decision was plainly inconsistent with this Court's precedents. But the Tenth Circuit is not the only court of appeals to struggle with the application of those precedents. There is considerable confusion in the circuits, and a sharp split of authority, about how to determine arbitrability in the context of postexpiration disputes such as this one.

Voluntary arbitration is a common, and important, means of alternative dispute resolution. But, because arbitration requires waiver of important judicial rights, it is equally important that courts do

not force involuntary arbitration. The confusion in lower courts about the arbitrability of postexpiration disputes results in such involuntary arbitration. That confusion also encourages forum shopping and discourages individuals and entities from entering arbitration clauses. This Court should grant certiorari to provide guidance on these issues of national importance.

A. Factual Background and Initial Proceedings

In December 1999, Respondent Kerry Hicks and another officer of his company signed a promissory note evidencing a $3,550,000 loan from Bank of America ("BOA"). (Aplt. App. 107-111).[1] In the first paragraph of that note, Mr. Hicks represented that he and his co-maker were "unconditionally" and "jointly and severally" liable for the full amount of the loan. (Aplt. App. 107). Moreover, in bold text immediately before his signature, Mr. Hicks agreed that the note was the parties' final agreement, which could not be contradicted by evidence of prior, contemporaneous, or subsequent oral agreements. (Aplt. App. 111). Mr. Hicks also agreed: "THERE ARE NO UNWRITTEN ORAL AGREEMENTS BETWEEN THE PARTIES." *Id.* Mr. Hicks

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[1] The Tenth Circuit mistakenly stated that the loan was in the amount of $3,350,000. *Compare* App. 2a *with* (Aplt. App. 107) (copy of the $3,550,000 promissory note).

Record citations are from the Appendix to Appellants' Brief ("Aplt. App."), and the Appellee's Supplemental Appendix ("Aple. Supp. App."), filed in the Court of Appeals.

eventually paid $2,000,000 on the note, with an additional $550,000 paid by a third party. Thereafter, Mr. Hicks, again as a co-maker, signed a $1,000,000 renewal note to BOA (the "Note"), which contained identical prominent language about Mr. Hicks' unconditional, joint and several liability, and about the lack of any oral agreements between the parties. (Aplt. App. 117, 120).

The Note also contained an arbitration clause, which provided that:

> Any controversy or claim *between or among the parties hereto*, including, but not limited to those arising out of or relating to this instrument, agreement or document or any related instruments, agreements or documents, including any claim based on or arising from an alleged tort, shall be determined by binding arbitration . . . . *Any party to this instrument*, agreement or document may bring an action . . . to compel arbitration of any controversy or claim to which this agreement applies . . . .

(Aplt. App. 119-20 ¶15) (emphases added) (capitalization omitted).

Notwithstanding his contrary representations in the promissory notes, Mr. Hicks claimed that his liability in connection with the $3,550,000 loan was limited to $2,350,000, because he had made an oral side agreement with Walker Choppin, a BOA employee, to that effect. *See* App. 2a. Mr. Choppin later testified that, while BOA had been asked to structure the Note to limit Mr. Hicks' liability, BOA

was unable to accommodate that request. (Aplt. App. 518).

The Note was not repaid, and in October 2002 BOA sold the Note to Petitioner Buckeye Retirement Co., LLC, Ltd. ("Buckeye"). App. 3a; (Aplt. App. 468).[2] Roughly a year later, pursuant to the venue clause in the Note (Aplt. App. 119 ¶11), Buckeye filed suit against Mr. Hicks and the other co-maker in Tennessee to recover the balance due. Mr. Hicks then initiated an arbitration proceeding ("Arbitration I") in Colorado against BOA, Buckeye and Petitioner The Cadle Company ("TCC"), contending that BOA committed fraud in connection with the sale of the Note, and that Buckeye and TCC engaged in tortious collection activities by filing suit in Tennessee in light of the Note's arbitration clause. App. 3a.

In April 2005, the arbitrator in Arbitration I—terming the filing of the Tennessee lawsuit "offensive" in light of the Note's arbitration clause—awarded Mr. Hicks $400,000 against TCC and Buckeye, plus attorney's fees. *See* App. 5a; *Hicks v. Bank of Am.*, 218 Fed. App'x 739, 744 (10th Cir. Feb. 21, 2007). The district court confirmed this award. In a prior appeal, the Tenth Circuit characterized the arbitrator's decision as "delphic" and "anything but a

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[2] While the Tenth Circuit stated that BOA sold the Note to Petitioner The Cadle Company, App. 3a, the Note was actually sold to Buckeye. (Aplt. App. 316, 468). In a prior appeal, the Court of Appeals concluded that there was evidence that The Cadle Company and Buckeye operated as alter egos. *Hicks v. Bank of Am.*, 218 Fed. App'x 739, 746 (10th Cir. Feb. 21, 2007).

model of clarity," and the court recognized that "defendants' liability for abuse of process in attempting to collect from Hicks may be a close call." *Hicks*, 218 Fed. App'x at 746, 748. However, given the very deferential review owed the arbitrator, the Court of Appeals concluded that it had no basis to vacate the award. *See id.* at 748.

B. The Second Arbitration

In December 2003, while Arbitration I was pending, BOA repurchased the Note from Buckeye (Aplt. App. 317 ¶15), and the Tennessee lawsuit was dismissed. App. 3a. Two months later, BOA sold the Note to a third party (Aplt. App. 495), with the express acknowledgment that "Kerry R. Hicks has been released from any further or additional liability under the Note or Loan Documents." (Aplt. App. 496 ¶3(g)). Thus, it is undisputed that, as of February 2004, any further liability of Mr. Hicks under the Note was extinguished, and neither Mr. Hicks nor any of the Petitioners was a party to any unexpired agreement.

Seven months later, in September 2004, Petitioner William Shaulis, a manager of Buckeye, wrote letters to the Tennessee and Colorado attorneys general reporting possible bank fraud by Mr. Hicks (the "Shaulis letters"). App. 4a; (Aplt. App. 468-70). Thereafter, Mr. Hicks filed suit in Colorado state court against BOA as well as the Petitioners before this Court: Buckeye, TCC, Mr. Shaulis, and TCC President, Daniel Cadle. Mr. Hicks alleged the same claims he had previously asserted in Arbitration I, and he also added claims for abuse of process, defamation and intentional infliction of emotional distress based on the Shaulis letters. (Aplt.

Supp. App. 1); (Aplt. App. 308); App. 4a. Mr. Hicks' complaint ultimately became the basis for another round of arbitration ("Arbitration II"), and for the appeal at issue in this petition.

BOA removed the Colorado suit to federal district court pursuant to 28 U.S.C. § 1332, and then moved to stay the action pending the resolution of Arbitration I. Petitioners joined the motion for a stay, App. 4a, but neither BOA nor Petitioners moved to dismiss Mr. Hicks' suit. Mr. Hicks opposed a stay, contending that (a) the Note did not include his claims against the Petitioners that were based on the Shaulis letters; (b) none of the Petitioners was a holder of the Note at the time of the letters; and (c) the parties never agreed to arbitrate the Shaulis letter claims. *Id.*

Thereafter, Mr. Hicks also filed an amended complaint ("Amended Complaint") in the removed federal district court action (Aplt. App. 315), which deleted BOA as a Defendant, and asserted only the Shaulis letter claims against Petitioners. In the Amended Complaint, Mr. Hicks noted: "None of the Defendants was a holder of the Note at the time that Shaulis made the bank fraud charges. [TCC], Shaulis, and Daniel C. Cadle have never been a holder of the Note." (Aplt. App. 318). Mr. Hicks also made a jury demand in the Amended Complaint (Aplt. App. 321), which was never withdrawn.

In January 2005, the district court stayed the lawsuit pending completion of arbitration. App. 4a. Mr. Hicks then filed a motion for clarification, requesting the district court to determine whether all of the Defendants were subject to the arbitrator's jurisdiction. In his motion, Mr. Hicks noted: "two of

the four Cadle Defendants, Mr. Shaulis and Mr. Cadle, are not parties to [Arbitration I], are not parties to any agreement to arbitrate, and have not agreed to voluntarily subject themselves to arbitration." (Aplt. App. 1160-61). The Petitioners filed a response, making clear they had not intended to consent to the arbitrator's jurisdiction through the joinder motion. (*See* Aplt. App. 1166) (arguing that "if Hicks seeks to litigate claims against Mr. Shaulis and/or Mr. Cadle, Hicks must attempt to have [the arbitrator] assert jurisdiction over such persons"). Nonetheless, in March 2005, the district court ruled that all of the Petitioners voluntarily submitted to the arbitrator's jurisdiction for resolution of the claims in Mr. Hicks' Amended Complaint. (Aplt. App. 45-49); App. 4a-5a.

The following month, Mr. Hicks filed his Statement of Claims for Arbitration II, which mirrored the claims he had made in the Amended Complaint. (Aplt. App. 204-10). The factual predicate for each of the causes of action asserted in this Statement of Claims was the content of the Shaulis letters. *Id.* In response to Mr. Hicks' Statement of Claims, Petitioners noted that BOA "repurchased the Note in December of 2003 and that in September of 2004 [the date of the Shaulis letters] neither Buckeye, nor any of the Cadle Respondents, was a holder of the Note." (Aplt. App. 360, 376). Petitioners also raised, as an affirmative defense, that Mr. Hicks' "claims are barred by lack of subject matter jurisdiction . . . as such claims do not arise and/or are not related to the Note or any party to or holder of the Note in September of 2004." (Aplt. App. 377).

The hearing in Arbitration II was held in October 2006. App. 6a. After conclusion of the evidence, Mr. Hicks moved to assert additional claims for liability and damages based on conduct that occurred *after* the Shaulis letters, conduct which was not referenced in either the Amended Complaint or Mr. Hicks' Statement of Claims. (Aplt. App. 366-69). Over Petitioners' opposition, the arbitrator granted Mr. Hicks' motion. (Aplt. App. 371-72 #10).

In May 2007, the arbitrator issued his award in Arbitration II, granting Mr. Hicks $750,000 in actual damages against Mr. Cadle, TCC and Buckeye, with an additional $200,000 against Mr. Shaulis, TCC and Buckeye. App. 74a, 85a. Further, although Mr. Hicks had not pled a request for punitive damages in the Amended Complaint, the arbitrator assessed punitive damages against Mr. Cadle, TCC and Buckeye in the amount of $950,000, and an additional $10,000 in punitive damages against Mr. Shaulis, TCC and Buckeye, *id.* at 75a, for a total award against Petitioners in the amount of $1,910,000. This was in addition to the $400,000 in damages assessed by the arbitrator against Buckeye and TCC in Arbitration I. (Aplt. App. 466).

C. Proceedings Below

On July 23, 2008 the district court confirmed the Arbitration II award, but removed the arbitrator's assessment of pre-judgment interest. App. 49a. The district court then entered a final judgment against Petitioners on October 10, 2008 for the total amount of $1,910,000. (Aplt. App. 37-38).

On December 7, 2009 the Tenth Circuit Court of Appeals, without granting oral argument, issued a 27-page unpublished opinion affirming the

$1,910,000 judgment against Petitioners, but reinstating the arbitrator's assessment of pre-judgment interest. *See* App. 1a-24a.

The Tenth Circuit rejected Petitioners' argument that the arbitrator in Arbitration II lacked jurisdiction over them. The Court of Appeals recognized that the Arbitration II claims arose after BOA had reacquired the Note from Buckeye, and after Mr. Hicks had been relieved of liability under the Note. App. 10a. But the Tenth Circuit concluded, without analysis, that the Arbitration II claims arose under the Note, and the court applied a presumption in favor of postexpiration arbitrability. *Id.* at 9a, 10a-11a. The Tenth Circuit also reasoned that: Petitioners were judicially estopped from challenging the arbitrator's jurisdiction; Mr. Hicks' assertion of new claims after the end of the arbitration was a procedural matter within the arbitrator's discretion to decide; and, even though Petitioners Mr. Cadle and Mr. Shaulis were never parties to the Note, they were, as agents of Buckeye and TCC, bound by the arbitration clause. *Id.* at 11a-13a.

REASONS FOR GRANTING THE PETITION

I. The Tenth Circuit Rejected this Court's Arbitration Precedent on Issues Which Have Generated a Circuit Split and Substantial Confusion Amongst the Lower Courts.

It is axiomatic that, under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, arbitration is a matter of consent, not coercion. This means parties cannot be compelled to arbitrate disputes unless they have agreed to do so. Consistent with this principle, this Court has held that parties

may be required to arbitrate a dispute that arises after the expiration of their contract only if the dispute has its real source in the contract. *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 205 (1991).

In the decision below, the Tenth Circuit did not adhere to these principles and failed even to acknowledge, much less apply, *Litton*'s controlling test. As a result, the Court of Appeals required Petitioners to arbitrate a postexpiration dispute with Respondent, even though that dispute does not arise from the expired contract between Respondent and one of the Petitioners. Because the decision below conflicts with this Court's precedent on an important question of federal law, this Court should grant certiorari. *See* Part I.A, *infra*; Sup. Ct. R. 10(c).

This Court should also grant certiorari to resolve the substantial confusion, and clear circuit split, about how to apply *Litton*. Given the widespread use of arbitration clauses and the potential for forum shopping, uniform interpretation of federal law in this area is particularly important. Addressing the merits of this case would provide much needed guidance to lower courts. *See* Part I.B, *infra*; Sup. Ct. R. 10(a).

A. The Decision Below Disregards *Litton*'s Controlling Test for Determining the Arbitrability of Postexpiration Disputes.

As this Court has noted on numerous occasions, arbitration jurisdiction under the FAA is consensual in nature. *See, e.g., Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. ___ (2010), slip op. at 17-20; *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995); *Volt Info. Sciences, Inc. v. Bd. of*

Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989). While in general there is a strong federal policy in favor of consensual arbitration for resolving disputes, "the FAA's proarbitration policy does not operate without regard to the wishes of the contracting parties." *Mastrobuono*, 514 U.S. at 57. "'Arbitration under the [FAA] is a matter of consent, not coercion[.]'" *Id.* (quoting *Volt*, 489 U.S. at 479).

Because "arbitration is simply a matter of contract between the parties," this Court has held "it is a way to resolve those disputes—*but only those disputes*—that the parties have agreed to submit to arbitration." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) (emphasis added). Thus, parties cannot be forced to arbitrate disputes they have not agreed to submit to arbitration. *See, e.g.*, *Volt*, 489 U.S. at 479. This Court has similarly recognized that parties "may specify *with whom* they choose to arbitrate their disputes." *Stolt-Nielsen*, 559 U.S. ___, slip op. at 19; *see also id.* ("'An arbitration agreement must be enforced notwithstanding the presence of other persons who are parties to the underlying dispute but not to the arbitration agreement[.]'") (quoting *Moses H. Cone Memorial Hospital v. Mercury Constr.*, 460 U.S. 1, 20 (1983) (alteration omitted)). Put simply, "'nothing in the [FAA] authorizes a court to compel arbitration of any issues, *or by any parties*, that are not already covered in the agreement.'" *Stolt-Nielsen*, 559 U.S. ___, slip op. at 19 (quoting *Waffle House*, 534 U.S. at 289) (emphasis in *Stolt-Nielsen*) (alteration omitted).

In *Litton*, this Court addressed the arbitrability of disputes that arise after the expiration of a contract containing an arbitration clause. A prior

case, *Nolde Brothers, Inc. v. Bakery Workers*, 430 U.S. 243 (1977), had recognized "a presumption in favor of postexpiration arbitration of matters unless 'negated expressly or by clear implication[.]'" *Litton*, 501 U.S. at 204 (quoting *Nolde Brothers*, 430 U.S. at 255). The Court in *Litton* acknowledged the *Nolde Brothers* presumption, but emphasized that it "was limited by the vital qualification that arbitration was of matters and disputes arising out of the relation governed by contract." *Litton*, 501 U.S. at 204. Because "[t]he object of an arbitration clause is to implement a contract, not to transcend it[,]" the *Nolde Brothers* presumption "appl[ies] only where a dispute has its real source in the contract." *Id.* at 205.

In *Litton*, this Court also identified the circumstances in which a postexpiration dispute has its real source in the contract:

> [a] postexpiration grievance can be said to arise under the contract *only* [1] where [the postexpiration complaint] involves facts and occurrences that arose before expiration, [2] where an action taken after expiration infringes a right that accrued or vested under the agreement, or [3] where, under normal principles of contract interpretation, the disputed contractual right survives expiration of the remainder of the agreement.

Id. at 205-06 (emphasis added).

In ruling that Petitioners were bound by the expired arbitration clause at issue in this case, the Tenth Circuit disregarded these principles. The Tenth Circuit repeatedly referred to a presumption in

favor of arbitrability, App. 9a, 11a, but failed to analyze the "vital qualification" to that presumption: *viz.*, it applies "only where a dispute has its real source in the contract." *Litton*, 501 U.S. at 204, 205. Put differently, as the Seventh Circuit has recognized in an en banc decision by Judge Posner, the first presumption under *Litton* is that parties are *not* bound by provisions in expired contracts. *See Bidlack v. Wheelabrator Corp.*, 993 F.2d 603, 606-07 (7th Cir. 1993). That presumption can only be overcome—and trigger the *Nolde Brothers* presumption in favor of arbitrability—if one of the three prongs of the *Litton* test is satisfied. *See Litton*, 501 U.S. at 204-06.[3]

Rather than applying the *Litton* test to determine whether the dispute in this case has its real source in the promissory note with the arbitration clause, the Tenth Circuit simply stated, without explanation, that Petitioners' allegedly tortious actions were "directly tied to the note," and "ar[ose] from [that] note." App. 10a.[4] Had the Court of Appeals applied

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[3] *Litton*, *Bidlack* and many of the other cases discussed herein arose in the context of arbitration clauses in collective bargaining agreements (CBAs). Those decisions rest on ordinary principles of contract interpretation and are equally applicable here. *See, e.g.*, *Litton*, 501 U.S. at 200-01, 206-07; *Cincinnati Typographical Union No. 3 v. Gannett Satellite Info. Network, Inc.*, 17 F.3d 906, 909 (6th Cir. 1994).

[4] The district court similarly failed to apply the *Litton* test. The district court asserted, without analysis, that the "arbitration provision survives the expiration of the Note," and that the parties' dispute had its "genesis" in issues related to the Note. App.

the controlling *Litton* test, the result would have been clear: the undisputed facts show that Mr. Hicks' postexpiration complaints against Petitioners do not fall within any of the three *Litton* limitations.

First, all of the claims asserted by Mr. Hicks involve operative facts and causes of action that occurred postexpiration. (Aplt. App. 318-20). In December 2003, BOA repurchased the Note from Buckeye (Aplt. App. 317 ¶15, 318 ¶18), and, in February 2004, BOA assigned the Note to a third party, expressly acknowledging that Mr. Hicks had "been released from any further or additional liability under the Note or Loan Documents." (Aplt. App. 496 ¶ 3(g)). All of the claims asserted by Mr. Hicks against the Petitioners in Arbitration II arose after both of these events. Specifically, Mr. Hicks' claims were based on the September 2004 Shaulis letters. Mr. Hicks has himself acknowledged that the Arbitration II claims "arose independent of the Note," that he "never agreed to arbitrate [those] claims," and that they are not subject to involuntary arbitration. (Aplt. App. 296, 309-12); (Aple. Supp. App. 43-48).[5]

37a. The district court also made a clear factual error, stating: "[i]n the present case, there was no agreement that Plaintiff had been released from liability under the Note at the time the Note was assigned[.]" *Id.* The undisputed evidence was just the opposite—everyone agreed that Mr. Hicks had been released from liability by the time BOA assigned the Note to a third party in February 2004. (Aplt. App. 496 ¶3(g)).

[5] As described *supra*, *see* page 10, after the Arbitration II hearing, the arbitrator permitted Mr.

Accordingly, the postexpiration grievances asserted by Mr. Hicks in Arbitration II do not involve facts or occurrences that arose before expiration of the Note. *See Litton*, 501 U.S. at 205-06.

Second, the alleged torts at issue in Arbitration II were, as discussed, based on the Shaulis letters and subsequent conduct by Petitioners. They are not dependent upon any rights under the Note, nor do they require any interpretation or application of the Note. Accordingly, the postexpiration grievances asserted by Mr. Hicks in Arbitration II do not involve actions taken after expiration of the Note which infringe a right that accrued or vested under the Note. *See Litton*, 501 U.S. at 205-06.

Finally, under ordinary principles of contract interpretation, this postexpiration dispute is not covered by the Note's arbitration clause. The arbitration clause lacks any indication that the parties intended to bind themselves to arbitrate after their contractual relationship expired. On the contrary, as Mr. Hicks has pointed out, that clause expressly limits its applicability to the "parties hereto," meaning that the underlying claim or controversy must arise during the time that the plaintiff and the defendant are parties to the Note. (Aplt. App. 310-11); (Aple. Supp. App. 46-47). In other words, in order for this particular arbitration clause to be applicable, the plaintiff and the

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Hicks to amend his claims based on additional alleged conduct of the Petitioners that postdated the Shaulis letters (and thus even further postdated the expiration of the contractual relationship between Mr. Hicks and Buckeye). (Aplt. App. 366-69, 371-72).

defendant must have been parties to the Note at the time the controversy or claim arose. *See id.*; *see also Litton*, 501 U.S. at 206 ("[A]n expired contract has by its own terms released all its parties from their respective contractual obligations, except obligations already fixed under the contract but as yet unsatisfied."). Nothing in the Note even arguably suggests that the parties were also agreeing to arbitrate postexpiration torts based on conduct that occurred *after* the expiration of the Note. Accordingly, under normal principles of contract interpretation, this dispute does not implicate a contractual right that survived the expiration of the remainder of the Note. *See Litton*, 501 U.S. at 205-06.

As the foregoing analysis reveals, this is not a case of error correction—where a lower court recognizes the correct rule of law but misapplies it to the facts of a case. Rather, the Tenth Circuit disregarded the correct rule of law established by this Court. Specifically, the Court of Appeals applied a presumption of arbitrability without so much as acknowledging the controlling test set forth by this Court for determining whether that presumption applies. Given the importance of this issue, *see* Part III, *infra*, certiorari is warranted. *See* Sup. Ct. R. 10(c).

B. Granting Certiorari Would Allow this Court to Resolve the Circuit Split over the Application of the *Litton* Test.

Certiorari is also warranted because circuit courts are divided about how to apply *Litton*'s three-prong test for determining whether a postexpiration dispute is arbitrable. *See* Sup. Ct. R. 10(a).

The Eighth Circuit has adopted an expansive reading of the *Litton* test, which appears to create a significant risk that parties will be required to arbitrate postexpiration disputes even when they have not consented to do so. In the Eighth Circuit's view, *Litton* stands for the proposition that a postexpiration dispute is subject to mandatory arbitration where "any of the facts and circumstances leading to the [dispute] arose before termination." *Trinidad Corp. v. Nat'l Maritime Union of Am.*, 81 F.3d 769, 773 (8th Cir. 1996). As discussed, the Tenth Circuit did not even attempt to apply *Litton*'s test in the decision below. However, by requiring Petitioners to submit to arbitration—even though the postexpiration dispute at issue here does not have its real source in the Note—the Tenth Circuit has effectively aligned itself with the Eighth Circuit's approach in *Trinidad*.

The Sixth Circuit, on the other hand, has considered and rejected the Eighth Circuit's interpretation of *Litton*. *See South Central Power Co. v. Int'l Bhd. of Elec. Workers, Local Union 2359*, 186 F.3d 733, 740 (6th Cir. 1999). The Court in *South Central* confessed that "the precise reach of the *Litton* test is uncertain," *id.* at 739, but concluded that the Eighth Circuit's *Trinidad* decision constitutes an "undesirable extension of *Nolde Brothers* and *Litton*." *Id.* at 740. Emphasizing "the general principle that the obligation to arbitrate grievances does not continue in effect after the agreement expires," *South Central* determined that the Eighth Circuit's approach would risk allowing the exception—requiring arbitration of certain postexpiration disputes—to "swallow[] the rule." *Id.* The Sixth Circuit adopted an alternative framework for

applying *Litton*: a postexpiration "dispute 'arises under the contract' when a majority of the material facts and occurrences arose before the expiration of the . . . agreement." *Id.*; *see also Zucker v. After Six, Inc.*, 174 Fed. App'x 944, 947-48 (6th Cir. Apr. 7, 2006) (applying *Litton* and *South Central* to hold that a postexpiration dispute was not arbitrable).[6]

The Ninth Circuit, in turn, has rejected *South Central*, and appears to take a position between that of the Eighth and Sixth Circuits. *See Operating Eng'rs Local Union No. 3 v. Newmont Mining Corp.*, 476 F.3d 690, 693 (9th Cir. 2007). Criticizing the *South Central* majority, the Ninth Circuit concluded that courts should not "mere[ly] count[] the number of facts or occurrences that took place before or after the expiration of the [agreement]." *Id.* Instead, the Ninth Circuit adopted the following, somewhat tautological rule:

> [T]he determinative issue is not necessarily the relative importance of the facts that took place before the [agreement's] expiration, but whether those facts and the dispute over them is

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[6] Dissenting in *South Central*, Judge Kennedy urged an even narrower reading of the *Litton* test than her colleagues in the majority. *See* 186 F.3d at 742-43. Judge Kennedy argued that *Litton* only permits arbitration of postexpiration disputes when both: (1) the relevant facts and circumstances arise before expiration of the contract; and (2) "the right accrued or vested under the agreement or a disputed contractual right survives." *Id.* at 742.

> one that the parties agreed to arbitrate. Although the preexpiration facts or occurrences to be arbitrated must be of *some* significance in the dispute, the dispute must be arbitrated if the parties agreed to arbitrate those facts or occurrences.

Id.

These cases evince a clear circuit split about how to apply *Litton*'s test for determining the arbitrability of postexpiration grievances. Nor is this the only area in which *Litton* has caused confusion in the lower courts. Panels in the Third and Eighth Circuits have divided over how *Litton* applies to disputes that occur while a contract containing an arbitration clause is still in force. The majority in each case read *Litton* to mean that courts may consider the underlying merits in determining whether a preexpiration dispute is arbitrable. *See Rite Aid of Penn., Inc. v. United Food and Commercial Workers Union, Local 1776*, 595 F.3d 128, 136-37 (3d Cir. 2010); *Int'l Bhd. of Elec. Workers, AFL-CIO, Local 1 v. GKN Aerospace N. Am., Inc.*, 431 F.3d 624, 628 (8th Cir. 2005). The dissenters disagreed with their colleagues on this point, arguing that *Litton* only applies to postexpiration disputes. *See Rite Aid*, 595 F.3d at 146-48 (Ambro, J., dissenting); *Int'l Bhd. of Elec. Workers*, 431 F.3d at 632 (Heaney, J., dissenting). Faced with this issue, the Seventh Circuit has characterized this Court's reasoning in *Litton* as "less than clear," but read the decision broadly to stand for the proposition that "[i]f the court must, to decide the arbitrability issue, rule on the merits, so be it." *Indep. Lift Truck Builders*

Union v. Hyster Co., 2 F.3d 233, 236 (7th Cir. 1993). *Litton* has therefore been read by courts to justify a temptation to peek (or worse) at the merits of the dispute, a situation this Court has criticized in other contexts. *See, e.g., Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006) (court must evaluate arbitration clause separately from the merits, even if underlying contract alleged to be void *ab initio*).

Litton has generated considerable confusion in the lower courts. Granting certiorari in this case would allow the Court to resolve that confusion. Of most importance, it would permit this Court to resolve the circuit split about the proper application of *Litton*'s three-part test to postexpiration disputes. Absent this Court's intervention, the circuit split may encourage forum shopping among litigants seeking to compel (or avoid) arbitration. *See generally Southland Corp. v. Keating*, 465 U.S. 1, 15 (1984).

II. This Court Should Also Grant Certiorari, or Remand for Further Consideration, Because the Decision Below Conflicts with *Stolt-Nielsen*.

The decision below not only conflicts with *Litton*, it also conflicts with this Court's recent decision in *Stolt-Nielsen*. In *Stolt-Nielsen*, this Court forcefully reaffirmed that arbitration is a matter of consent, not coercion. Applying this precept, the Court held that parties cannot be required: (1) to arbitrate disputes they did not agree to arbitrate; or (2) to arbitrate with parties with whom they did not agree to arbitrate. *See* 559 U.S. ___, slip op. at 17-20. The decision below is inconsistent with both of these principles.

The conflict between the decision below and *Stolt-Nielsen* provides an additional reason why this Court

should grant certiorari. *See* Sup. Ct. R. 10(c). In the alternative, this Court should grant certiorari, vacate the judgment below, and remand for further consideration (GVR) in light of *Stolt-Nielsen*.

A. *Stolt-Nielsen* Confirms that the Arbitration Award Here Must Be Vacated Because the Arbitrator Lacked Jurisdiction.

The question presented in *Stolt-Nielsen* was whether shipping companies (collectively "Stolt-Nielsen") were required to submit a dispute with a supplier of ingredients for animal-feed producers ("AnimalFeeds") to class arbitration. *See* 559 U.S. ___, slip op. at 1. Before the arbitration panel, counsel for AnimalFeeds acknowledged that the arbitration clause at issue was "silent" with respect to class arbitration, which meant "not simply . . . that the clause made no express reference to class arbitration," but that "'there's been no agreement [between the parties] that has been reached on that issue.'" *Id.* at 4. The arbitration panel nonetheless concluded that the arbitration clause permitted class arbitration, and Stolt-Nielsen sought judicial review. The district court vacated the panel's decision, but the Second Circuit reversed. *See id.* at 5-6.

This Court granted certiorari and reversed the decision of the Second Circuit, holding:

> [C]onsistent with our precedents emphasizing the consensual basis of arbitration, we see the question as being whether the parties *agreed to authorize* class arbitration. Here, where the parties stipulated that there was "no agreement" on this question, it follows

> that the parties cannot be compelled to submit their dispute to class arbitration.

Id. at 23. In reaching a contrary conclusion, the "arbitration panel imposed its own policy choice and thus exceeded its powers," warranting vacatur of the arbitration award under the FAA. *Id.* at 12; *see also id.* at 7 (citing 9 U.S.C. § 10(a)(4)).

Stolt-Nielsen makes clear that the arbitrator likewise lacked jurisdiction over this case. In *Stolt-Nielsen*, this Court emphatically reaffirmed the FAA's cardinal principle that arbitration is a matter of consent. "[T]he FAA imposes certain rules of fundamental importance, including the basic precept that arbitration 'is a matter of consent, not coercion.'" *Stolt-Nielsen*, 559 U.S. __, slip op. at 17 (quoting *Volt*, 489 U.S. at 479); *see also id.* at 18 ("[W]e have said on numerous occasions that the central or 'primary' purpose of the FAA is to ensure that 'private agreements to arbitrate are enforced according to their terms.'") (quoting *Volt*, 489 U.S. at 479) (additional citations omitted); *id.* at 20 (referring to "the foundational FAA principle that arbitration is a matter of consent"). Therefore,

> [w]hether enforcing an agreement to arbitrate or construing an arbitration clause, courts and arbitrators must "give effect to the contractual rights and expectations of the parties." In this endeavor, "as with any other contract, the parties' intentions control."

Id. at 18 (citations omitted); *see also id.* at 20 ("[C]ourts and arbitrators must not lose sight of the purpose of the exercise: to give effect to the intent of the parties.").

Stolt-Nielsen's application of this foundational principle warrants certiorari review, or at a minimum a GVR, for two reasons. First, *Stolt-Nielsen* holds that, from the consensual nature of arbitration, "it follows that a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." *Id.* And, because the parties in *Stolt-Nielsen* had stipulated that they had not reached an agreement about class arbitration, there was no need for additional analysis of the contract to ascertain the parties' intent. *See id.* at 11-12, 23. Contrary to *Stolt-Nielsen*, here the Tenth Circuit affirmed the arbitration award against Petitioners even though the parties never agreed to arbitrate this postexpiration dispute. Indeed, as noted, Mr. Hicks has acknowledged that the Arbitration II claims arose independent of the Note and that the parties did not agree to arbitrate them. (Aplt. App. 296, 309-12); (Aple. Supp. App. 43-48); App. 4a.

Second, the Court in *Stolt-Nielsen* held: "We think it is also clear from our precedents and the contractual nature of arbitration that parties may specify *with whom* they choose to arbitrate their dispute." 559 U.S. ___, slip op. at 19. In this case, although the arbitration clause in the Note is broad as to subject matter, it is appropriately narrow as to the parties who would be subject to arbitration. By the Note's express terms, the duty to arbitrate is limited to the "part[ies] to this instrument." (Aplt. App. 119 ¶15). As discussed, neither Mr. Hicks nor Petitioners were parties to the instrument when the dispute underlying Arbitration II arose. Therefore, under *Stolt-Nielsen*, the arbitrator lacked jurisdiction over this dispute.

B. *Stolt-Nielsen* Also Confirms that the Tenth Circuit Made Other Significant Errors in Requiring Petitioners to Arbitrate this Dispute.

1. The Individual Petitioners Cannot Be Required to Arbitrate Because They Never Signed an Arbitration Agreement with Mr. Hicks.

As the Tenth Circuit acknowledged, the two individual Petitioners in this case, Mr. Cadle and Mr. Shaulis, *never* signed or were parties to an arbitration agreement with Mr. Hicks. Mr. Hicks himself has emphasized that Messrs. Cadle and Shaulis "were never parties to the Note." (Aplt. App. 312). Thus, even putting aside the postexpiration nature of Mr. Hicks' Arbitration II claims, *Stolt-Nielsen* confirms that it was improper for the individual Petitioners to be required to submit to arbitration, as "there is [no] contractual basis for concluding that [Mr. Cadle or Mr. Shaulis] *agreed* to do so." *Stolt-Nielsen*, 559 U.S. __, slip op. at 20.

The Tenth Circuit, however, bypassed this problem by concluding perfunctorily that Messrs. Cadle and Shaulis "are bound by the arbitration clause as agents of The Cadle Company and Buckeye." App. 11a. This conclusion can be reconciled neither with basic principles of agency law nor with basic precepts of arbitration law. Agents of disclosed principals are not parties to contracts simply because their principals enter into them. *See Bel-Rey Co., Inc. v. Chemrite, Ltd.*, 181 F.3d 435, 445 (3d Cir. 1999) (citing, *inter alia*, Restatement (Second) of Agency § 320 (1958)). Thus, when faced with this issue, the Third Circuit held that no principle of

agency law permits courts to compel nonsignatory employees or agents to arbitrate disputes based on arbitration agreements made by their corporation. *Id.* at 444-46.

In reaching a contrary result, the Tenth Circuit cited two decisions that do not support its conclusion. *See* App. 11a. Neither *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110 (3d Cir. 1993), nor *Arnold v. Arnold Corp.*, 920 F.2d 1269 (6th Cir. 1990), held that nonsignatory agents could be bound by arbitration agreements entered into by their corporation. Those cases involve the converse situation in which nonsignatory agents invoke an arbitration agreement signed by their corporate principal. *See Pritzker*, 7 F.3d at 1112-13, 1121; *Arnold*, 920 F.2d at 1281. This is a dispositive distinction. *See Tracinda Corp. v. DaimlerChrysler AG*, 502 F.3d 212, 224 (3d Cir. 2007); *Bel-Rey*, 181 F.3d at 444-45. An arbitration agreement cannot be foisted upon a nonsignatory against his will consistent with this Court's precedents about the consensual nature of arbitration.

The Tenth Circuit's failure to recognize the difference between nonsignatories who seek to invoke arbitration and nonsignatories who resist it is yet another example of that court disregarding the fundamental principle that arbitration is a matter of consent and can only be imposed on parties who agreed to it. *See Stolt-Nielsen*, 559 U.S. ___, slip op. at 17-20; *see also Bel-Rey*, 181 F.3d at 446 ("[T]raditional principles of contract and agency law do not support the conclusion that the parties resisting arbitration are bound by an arbitration agreement they did not sign.").

2. The Court of Appeals Relied on Other Inapposite Principles to Require Arbitration of Nonconsenting Parties.

a. *Judicial Estoppel*

The Tenth Circuit also agreed with the district court that Petitioners were "judicially estopped" from challenging the arbitrator's jurisdiction. App. 11a-12a. Judicial estoppel, however, is not a basis for arbitration jurisdiction set forth in the FAA, which only authorizes arbitration based on "an agreement in writing to submit to arbitration." 9 U.S.C. § 2; *see also* 9 U.S.C. § 4 (referring to "a written agreement for arbitration"). As *Stolt-Nielsen* forcefully confirms, arbitration is a matter of consent, and it is limited to those matters the parties have contractually agreed to arbitrate. *Stolt-Nielsen*, 559 U.S. ___, slip op. at 17-20. Judicial estoppel is not contractual in nature, but is an equitable and discretionary doctrine designed to promote the integrity of the judicial process. *See New Hampshire v. Maine*, 532 U.S. 742, 749-50 (2001).

In any event, the requirements for judicial estoppel are not satisfied here. A party can be bound to a prior position only if the "party's later position [is] 'clearly inconsistent' with its earlier position." *Id.* at 750 (citation omitted). Although Petitioners, in January 2005, joined BOA's motion to stay Mr. Hicks' court action pending arbitration, Petitioners did not concede that Messrs. Cadle and Shaulis were ever parties to the Note. (Aple. Supp. App. 30-34). Nor did Petitioners concede that the arbitrator had jurisdiction to resolve postexpiration claims against them. *See id.* It is therefore not clearly inconsistent

with their prior position for Petitioners to raise these arguments now.

Judicial estoppel is inapplicable for another, independent reason: Petitioners quickly clarified any confusion generated by their January 2005 joinder motion. The very next month, Petitioners filed a response to Mr. Hicks' motion for clarification of the district court's order, which explained that they had not intended to consent to the arbitrator's jurisdiction through the joinder motion. (*See* Aplt. App. 1164, 1166). Petitioners then strenuously opposed the arbitrator's jurisdiction in the arbitration proceedings. (Aplt. App. 375 #14, 377 #39, 482-93). Under these circumstances, the courts below erred by applying judicial estoppel. *See New Hampshire*, 532 U.S. at 753 ("We do not question that it may be appropriate to resist application of judicial estoppel 'when a party's prior position was based on inadvertence or mistake.'") (citation omitted).

b. *The Imposition of Liability Based on Unpled Claims*

Even putting aside the multiple errors in the Tenth Circuit's judicial estoppel analysis, the Court of Appeals plainly erred in enforcing the arbitration award against Petitioners, because the arbitrator imposed liability based on claims that Mr. Hicks did not present in his initial or Amended Complaint. As described above, in October 2006, after the hearing in Arbitration II—and almost two years after Petitioners' joinder in BOA's stay motion and Mr. Hicks' Amended Complaint—Mr. Hicks filed a motion to amend his Arbitration II claims to include 14 subsequent acts which went far beyond the claims that Mr. Hicks had originally asserted (the

"Additional Claims"). (Aplt. App. 371-72 #10). Over Petitioners' opposition, the arbitrator granted Mr. Hicks' motion, and ultimately imposed liability based on the Additional Claims. For example, although Mr. Hicks had never, prior to October 2006, pled a defamation claim based on the assertion that any of the Petitioners had made a false allegation of perjury against Mr. Hicks (*see* Aplt. App. 319-20), the Arbitrator assessed liability against Petitioners for an unpled defamation claim based on an accusation of perjury. App. 56a-57a & n.4, 67a. Petitioners' January 2005 joinder motion unquestionably did not concede that the arbitrator had jurisdiction to decide claims which Mr. Hicks had not yet brought, and which would "change[] the nature of [the] arbitration." *Stolt-Nielsen*, 559 U.S. ___, slip op. at 21.

The Tenth Circuit held that permitting these Additional Claims was a procedural matter within the discretion of the arbitrator. App. 12a-13a. Under this approach, the decision of the arbitrator to impose liability based on unpled claims was virtually unreviewable, and, indeed, the Tenth Circuit found no basis to disturb the award. *See generally First Options*, 514 U.S. at 942 (recognizing that a "party . . . can ask a court to review the arbitrator's decision, but the court will set that decision aside only in very unusual circumstances"). But, once again, the Tenth Circuit simply failed to address the threshold issue of consent. As *Stolt-Nielsen* makes clear, labeling Mr. Hicks' motion to present Additional Claims "procedural" cannot change the fact that the arbitrator lacked jurisdiction to decide these new claims, because Petitioners did not agree to arbitrate them. *See Stolt-Nielsen*, 559 U.S. __, slip op. at 23.

III. The Issues Presented Are Important, and this Case Presents a Good Vehicle for Resolving Them.

Arbitration clauses are common and used in a variety of contracts, and *voluntary* arbitration has substantial benefits. But, as this Court recently emphasized in *Stolt-Nielsen*, the FAA's "foundational . . . principle[,] that arbitration is a matter of consent," must be respected. 559 U.S. __, slip op. at 20. When parties are compelled to submit to arbitration, they forgo "the procedural rigor and appellate review of the courts," *id.* at 21, including, in federal court, the Seventh Amendment right to a jury trial. Ensuring that arbitrators do not exercise jurisdiction over nonconsenting parties is crucial--not only to protect the rights of those parties, but also to ensure the integrity of the arbitration system. As this Court has recognized, "[t]he willingness of parties to enter into agreements that provide for arbitration of *specified disputes* would be 'drastically reduced'" if arbitrators could expand their jurisdiction beyond what the parties intended. *AT&T Technologies, Inc. v. Communications Workers of Am., Inc.*, 475 U.S. 643, 651 (1986) (emphasis added) (citation omitted). In light of these important concerns, it is not surprising that this Court has repeatedly granted certiorari in cases raising questions of arbitrability and purported waivers of judicial rights resulting from arbitration clauses. *See, e.g., Stolt-Nielsen*, 599 U.S. ___; *GreenTree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003); *Waffle House*, 534 U.S. 279; *First Options*, 514 U.S. 938; *Litton*, 501 U.S. 190; *AT&T Technologies*, 475 U.S. 643.

This case illustrates the serious problems that occur when courts disregard the FAA's foundational principle that arbitration must be consensual. In the decision below, the Tenth Circuit required Petitioners to arbitrate a postexpiration dispute with Mr. Hicks even though: (1) that dispute did not have its source in the promissory note containing the arbitration clause; (2) two of the Petitioners *never* had a contractual relationship with Mr. Hicks; and (3) Mr. Hicks was permitted to fundamentally change the nature of the arbitration and scope of claims by an eleventh-hour amendment. This outcome is flatly contrary to *Litton* and *Stolt-Nielsen*, and it also reflects the continuing confusion and split of authority in the circuits about how to apply this Court's arbitration precedents. Granting certiorari would give this Court the opportunity to resolve these important issues. In the alternative, a GVR in light of *Stolt-Nielsen* would give the Tenth Circuit the opportunity to apply the correct rule of law.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

[Filed: 12/07/2009]

Nos. 08-1306, 1307, 1429 & 1435
(D.C. No. 1:04-CV-02616-ZLW-KLM)
(D. Colo.)

KERRY R. HICKS,
Plaintiff-Appellee/
Cross-Appellant,

v.

THE CADLE COMPANY; BUCKEYE RETIREMENT CO., LLC, LTD.; WILLIAM E. SHAULIS; DANIEL C. CADLE,
Defendants-Appellants/
Cross-Appellees.

ORDER AND JUDGMENT*

Before **HENRY**, Chief Judge, **PORFILIO**, and **HARTZ**, Circuit Judges.

These appeals and cross-appeal are from the district court's confirmation of an arbitration award and

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of these appeals. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The cases are therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

vacatur of post-award, prejudgment interest. The Cadle Company; Buckeye Retirement Co., LLC, LTD. (Buckeye); William E. Shaulis; and Daniel C. Cadle argue that (1) the arbitrator lacked jurisdiction; (2) they were denied their right to a jury trial; (3) the arbitrator's decision was made in manifest disregard of the law and in violation of public policy; and (4) the district court improperly reviewed the arbitrator's decision. In case number 08-1435, Kerry R. Hicks argues that the district court erred in vacating the arbitrator's award of post-award, prejudgment interest. We have jurisdiction under 28 U.S.C. § 1291 and 9 U.S.C. § 16(a)(1)(D). We affirm the confirmation of the arbitration award and reverse the vacatur of post-award, prejudgment interest.

I. BACKGROUND

This case has a lengthy history, which we summarize only briefly now. For a more detailed background discussion, see our prior decision in *Hicks v. Bank of America, N.A.*, 218 F. App'x 739, 741-44 (10th Cir. 2007).

The underlying dispute concerns collection activities on a promissory note. In December 1999, Mr. Hicks, the Chief Executive Officer of Specialty Care Network, Inc., and Patrick Jaeckle, another corporate officer, borrowed $3,350,000 from Bank of America. Under the written terms of the note, both were jointly and severally liable for the full amount. Mr. Hicks, however, had entered into an oral side agreement with a Bank of America employee, limiting his liability to $2,350,000 and agreeing that his signature on the note for the full amount was an accommodation until Bank of America could perfect its interest in Mr. Jaeckle's collateral for the other $1,000,000. The note contained an arbitration clause, providing that

"any controversy or claim between or among the parties hereto including but not limited to those arising out of or relating to" the note or any related agreement "including any claim based on or arising from an alleged tort, shall be determined by binding arbitration in accordance with the Federal Arbitration Act." Aplt. App., Vol. I at 110 (capitalization omitted).

In January 2000, Mr. Hicks paid $2,000,000 on the note. Bank of America renewed the note for the remaining $1,350,000. Later, Specialty Care Network paid $350,000. The note was again renewed; this time for $1,000,000. Bank of America never perfected a security interest in Mr. Jaeckle's collateral, and he never paid on the note.

In October 2002, Bank of America sold the $1,000,000 note to The Cadle Company, which began collection efforts. Bank of America informed The Cadle Company that it had concluded that Mr. Hicks was not obligated under the note. In September 2003, Buckeye, an alter ego of The Cadle Company, sued Mr. Hicks in Tennessee federal district court to recover the balance due on the note. On October 23, Mr. Hicks initiated arbitration proceedings in Colorado against Bank of America, Buckeye, and The Cadle Company, contending that Bank of America committed fraud in connection with the sale of the $1,000,000 note and Buckeye and The Cadle Company violated the arbitration clause by filing suit in Tennessee and engaging in tortious collection activities.

In December 2003, Bank of America repurchased the $1,000,000 note. The Tennessee lawsuit was dismissed. Bank of America sold the note to a third party, acknowledging that Mr. Hicks had been released from liability under the note.

On September 27, 2004, while arbitration was pending, Mr. Shaulis, Buckeye's manager, wrote letters to the Tennessee and Colorado attorneys general suggesting that Mr. Hicks should be investigated for the crime of bank fraud. On December 3, Mr. Hicks filed suit against Bank of America and the defendants in Colorado state court. He asserted the claims pending in arbitration and added new claims against defendants based on the letters for abuse of process, defamation, and intentional infliction of emotional distress. Bank of America removed the suit to federal district court and moved to stay the action pending arbitration. Defendants joined the motion for stay, noting that the action must proceed to arbitration as the note's arbitration clause encompassed nearly all of the claims asserted by Mr. Hicks. Mr. Hicks opposed a stay, stating the note did not include his claims against defendants that were based on the letters, no defendants held the note at the time of the letters, and the parties never agreed to arbitrate these claims.

On January 13, 2005, Mr. Hicks filed an amended complaint asserting only the claims against defendants. On January 14, the district court stayed the lawsuit pending completion of arbitration.

On January 25, 2005, Arbiter James D. Hinga determined that he had jurisdiction over the claims in the amended complaint, but he bifurcated them. He directed that in the first phase of arbitration, he would hear claims concerning the filing of the Tennessee lawsuit and in the second phase of arbitration, he would hear claims based on the allegations of bank fraud in the letters.

On March 23, 2005, in clarifying the stay pending arbitration, the district court determined that all

defendants voluntarily submitted to the arbitrator's jurisdiction for resolution of the claims in Mr. Hicks's amended complaint. The court determined that defendants' prior assertion that those claims must be decided in arbitration amounted to consent to the jurisdiction of the arbitrator to decide the claims in the amended complaint. Additionally, the court decided that judicial estoppel precluded defendants from claiming that they were not subject to the jurisdiction of the arbitrator for resolution of those claims.

On April 28, 2005, in the first phase of arbitration, Arbiter Hinga awarded Mr. Hicks $400,000 in damages, plus attorney's fees. The Arbiter decided that The Cadle Company and Buckeye improperly filed suit in Tennessee when the note's arbitration clause provided for arbitration and improperly attempted to collect on the note even though Bank of America had explained to The Cadle Company and Buckeye that Mr. Hicks was not liable. Additionally, Arbiter Hinga found that it was outrageous conduct to send letters to the attorneys general accusing Mr. Hicks of bank fraud.

On October 26, 2005, the district court confirmed this award under the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, rejecting The Cadle Company's and Buckeye's arguments that the arbitrator exceeded his authority and that the arbitration award manifestly disregarded the law. The court, however, deferred entering final judgment because other claims remained pending in arbitration, but concluded that the award was final for purposes of confirmation. Defendants appealed, and we affirmed. *See Hicks*, 218 F. App'x at 749.

Before the second phase of arbitration was completed, Arbiter Hinga passed away. A new arbiter,

Arbiter Frank N. Dubofsky, was selected. The second phase hearing was held in October 2006. After the hearing, Arbiter Dubofsky allowed Mr. Hicks to amend his statement of claims to conform to the evidence presented that defendants had made fourteen additional communications concerning bank fraud and perjury by Mr. Hicks.

On May 14, 2007, Arbiter Dubofsky decided in favor of Mr. Hicks on his defamation and emotional distress claims and against him on the abuse of process claim. The Arbiter stated that by the referring of the letters to the attorneys general, along with the other communications from Mr. Shaulis and Mr. Cadle to various governmental units from 2004 to 2006, all accusing Mr. Hicks of illegal conduct, defendants had "engaged in a relentless campaign to defame, intimidate and harass Hicks by raising alleged bank fraud, perjury and other serious allegations against" him. Aplt. App., Vol. I at 78. Finding no bank fraud or perjury by Mr. Hicks and that defendants never had a reasonable belief that either occurred, the arbitrator concluded that any claim of bank fraud or perjury was to retaliate against and intimidate Mr. Hicks. Further, the arbitrator found that defendants caused Mr. Hicks severe emotional distress by trying to have him criminally indicted and financially destroyed. Because defendants acted intentionally, willfully, wantonly, and maliciously in order to harm Mr. Hicks, the arbitrator decided that an award of punitive damages was warranted. In his final award, on June 18, Arbiter Dubofsky awarded Mr. Hicks (1) $750,000 in compensatory damages and $950,000 in punitive damages against Mr. Cadle, The Cadle Company, and Buckeye; and (2) $200,000 in compensatory damages and $10,000 in punitive damages against Mr. Shaulis. In addition, the arbitrator

awarded prejudgment interest on the compensatory damages from September 27, 2004 and post-award, prejudgment interest from the dates of the final arbitration awards through confirmation.

On July 23, 2008, the district court ruled on Mr. Hicks's motion to confirm the second-phase arbitration award and defendants' motions to vacate the award. The court reaffirmed that the arbitrator had jurisdiction over the defendants and over the claims. Additionally, the court rejected defendants' argument that the arbitrator manifestly disregarded the law in many ways, including disregarding the Tennessee parol evidence rule and statute of frauds by validating the oral side agreement;[1] deciding the issue of Mr. Hicks's criminal liability for bank fraud; granting Mr. Hicks's motion to amend his claims to conform to the evidence; misapplying the Tennessee anti-Strategic Lawsuits Against Political Participation statute, Tenn. Code Ann. § 4-21-1003; concluding Mr. Hicks suffered severe emotional distress; and awarding punitive damages. The court, however, vacated the award of post-award, prejudgment interest, concluding that the arbitrator manifestly disregarded the clear, controlling Tennessee law of *Francois v. Willis*, 205 S.W.3d 915, 916 (Tenn. Ct. App. 2006), which held that prejudgment interest cannot be awarded in personal injury actions. On August 6, the district court denied Mr. Cadle's motion for reconsideration.

On October 7, 2008, the district court granted Mr. Hicks's motion for entry of judgment and certification under Fed. R. Civ. P. 54(b) of the October 26, 2005 order confirming Arbiter Hinga's final arbitration

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[1] The note provided, and the parties agree, that Tennessee law applies.

award and the July 23, 2008 order confirming Arbiter Dubofsky's final arbitration award in all aspects other than the award of post-award, prejudgment interest. The court entered final judgment pursuant to Rule 54(b) on October 10, and denied Mr. Cadle's motion for reconsideration on October 22.

Defendants appeal from various orders. We consolidated their appeals, Nos. 08-1306, 08-1307, and 08-1429. Mr. Hicks cross appeals the portion of the order denying post-award, prejudgment interest in No. 08-1435.[2]

II. DISCUSSION

In their appeals, defendants raise several arguments: (1) the arbitrator lacked jurisdiction to consider the second-phase claims; (2) they are not judicially estopped from asserting that the arbitrator lacked jurisdiction; (3) even if the arbitrator had jurisdiction, he acted outside the scope of his authority; (4) the district court should not have confirmed the arbitration award because the arbitrator manifestly disregarded the law and violated public policy; and (5) the district court failed to apply the proper deferential standard of review. We discuss each of these arguments in turn, rejecting each. After that discussion we consider Mr. Hicks's cross-appeal. He argues that the district court misapplied Tennessee post-award, prejudgment interest law when denying

[2] On October 17, 2007, the district court allowed Mr. Hicks to file a supplemental complaint pertaining to alleged conduct by Mr. Cadle, The Cadle Company, and Buckeye occurring after the second-phase award. The court referred those claims for arbitration. This third phase of arbitration is not part of this appeal.

him interest. We agree, and we remand for the district court to amend the judgment to include interest.

A. The arbitrator had jurisdiction to consider the second-phase claims.

Defendants first argue that the arbitrator lacked jurisdiction over them when he arbitrated the second-phase claims. We review the question of arbitrability de novo. *Coors Brewing Co. v. Molson Breweries*, 51 F.3d 1511, 1513 (10th Cir. 1995).

As the parties are well aware, we begin with the strong federal policy, evinced by the FAA, in favor of arbitration for resolving disputes. *ARW Exploration Corp. v. Aguirre*, 45 F.3d 1455, 1462 (10th Cir. 1995). But "the FAA's proarbitration policy does not operate without regard to the wishes of the contracting parties." *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995); *Hollern v. Wachovia Sec., Inc.*, 458 F.3d 1169, 1174 (10th Cir. 2006) ("Arbitrators derive their authority from the parties' arbitration agreement."). Because "arbitration is a matter of contract, . . . a party cannot be required to submit to arbitration any dispute which he has not agreed to submit." *ARW Exploration Corp.*, 45 F.3d at 1460 (quotation marks and brackets omitted). If a contract has a broad, sweeping arbitration clause, it is presumed that disputes will be arbitrated. *Id.* at 1462. A party may overcome this presumption "only if 'it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.'" *Id.* (quoting *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 650 (1986)). We resolve any doubts in favor of arbitrability. *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 209 (1991); *Hollern*, 458 F.3d at 1173 ("In assessing the scope of the arbitrators' authority,

we are mindful of the strong presumption requiring all doubts concerning whether a matter is within the arbitrators' powers to be resolved in favor of arbitrability.").

Defendants argue that they and Mr. Hicks never had a meeting of the minds to arbitrate the second-phase claims concerning the letters. They point out that Mr. Hicks only agreed to arbitrate the first-phase claims, which arose when Buckeye held the note, and he did not agree to arbitrate the claims related to bank fraud asserted in the letters, which arose after Bank of America reacquired the note and he had been relieved of any liability under the note. Defendants contend that the second-phase arbitration claims therefore did not arise between or among the parties as the note's arbitration clause required. Thus, they assert that arbitration was improper because they were not parties to the note, all second-phase claims asserted in the second phase of arbitration occurred after Mr. Hicks had been released from liability under the note, and the arbitration clause of the note did not provide a basis for arbitration jurisdiction over defendants for the new tort claims.

We agree with the district court that the second-phase claims were within the jurisdiction of the arbitrator. The note's arbitration clause applied to all controversies arising out of and related to the note. *See* Aplt. App., Vol. I at 110. The note was binding on Bank of America's successors. *See Hicks*, 218 F. App'x at 746. Defendants' tortious actions are directly tied to the note. Defendants engaged in a continuous course of wrongful conduct all arising from a note with a broad arbitration clause. *See Riley Mfg. Co. v. Anchor Glass Container Corp.*, 157 F.3d 775, 781 (10th Cir. 1998) (recognizing that "when a dispute arises under

an expired contract that contained a broad arbitration provision, courts must presume that the parties intended to arbitrate their dispute[,] even if the facts of the dispute occurred after the contract expired").

Also, defendants contend that Mr. Shaulis and Mr. Cadle were never parties to the note. While this is true, they joined the motion for a stay and requested that all claims be decided by arbitration. Also, under the circumstances presented here, the two are bound by the arbitration clause as agents of The Cadle Company and Buckeye. *See Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110, 1121 (3d Cir. 1993) ("Because a principal is bound under the terms of a valid arbitration clause, its agents, employees, and representatives are also covered under the terms of such agreements."); *Arnold v. Arnold Corp.*, 920 F.2d 1269, 1281 (6th Cir. 1990) (following policy favoring arbitration, court decided that nonsignatories of arbitration agreement can be bound under agency principles).

B. The defendants are judicially estopped from asserting arbitral jurisdiction.

Defendants argue that they did not waive their right to have the second-phase claims tried in court. They contend that although they joined in Bank of America's stay motion, they did not move to have the lawsuit dismissed, since the lawsuit claims were intertwined with the arbitration claims.

The district court held that defendants were judicially estopped from contesting arbitral jurisdiction. In our decision affirming the first phase of arbitration, we noted that defendants waived any objection to arbitration and were estopped from asserting that the arbitrator lacked jurisdiction because they had

stated, when they joined Bank of America's motion for stay, that this action must be arbitrated. *See Hicks*, 218 F. App'x at 746. This is the law of the case. *See Homans v. City of Albuquerque*, 366 F.3d 900, 904 (10th Cir. 2004) ("In general, the law of the case doctrine provides that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." (quotation omitted)).

To the extent that all of defendants' objections to judicial estoppel were not before us in the prior appeal, we conclude, based on defendants' request for arbitration of the claims raised in the amended complaint, that they are judicially estopped from asserting that the arbitrator lacked jurisdiction over this appeal. *See New Hampshire v. Maine*, 532 U.S. 742, 749-51 (2001) (discussing judicial estoppel).

C. The arbitrator acted within the scope of his authority.

Even if the arbitrator had jurisdiction over the claims asserted in the amended complaint, defendants contend that he went beyond the scope of those claims by awarding damages in favor of Mr. Hicks for defamation and intentional infliction of emotional distress due to fourteen subsequent acts by them, for defamation because of the accusation that Mr. Hicks committed perjury, and for alter ego liability. Also, defendants contend that the arbitrator improperly awarded punitive damages even though Mr. Hicks had never requested them. We conclude that under the broad arbitration clause, the arbitrator acted within his jurisdiction.

The arbitrator had discretion to allow Mr. Hicks to amend his statement of claims to conform to the evi-

dence. *See United Steelworkers of Am. v. Ideal Cement Co.*, 762 F.2d 837, 841 (10th Cir. 1985) (citing *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557 (1964)) (recognizing that procedural matters are within discretion of arbitrator). The assertion that Mr. Hicks committed perjury by arguing that he did not commit bank fraud directly relates to the issues in arbitration and therefore was within the arbitrator's authority to arbitrate. Also, "there was abundant evidence before the arbitrator that [The Cadle Company] and Buckeye operated as alter-egos." *Hicks*, 218 F. App'x at 746.

Likewise, the arbitrator acted within his jurisdiction by considering whether to award punitive damages. Under Tennessee law, punitive damages need not be specifically pleaded in the complaint. *See Allen v. Melton*, 99 S.W.2d 219, 226 (Tenn. Ct. App. 1936). Rather, "a court may . . . award punitive damages . . . if it finds a defendant has acted either (1) intentionally, (2) fraudulently, (3) maliciously, or (4) recklessly." *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 (Tenn. 1992). In his amended complaint, Mr. Hicks contended that defendants acted maliciously, intentionally, willfully, recklessly, and outrageously. Aplt. App., Vol. II at 18-20. In awarding punitive damages, the arbitrator found these contentions to be true.

Additionally, we note that Mr. Hicks asked for punitive damages in his statement of claims filed eighteen months before the second-phase arbitration hearing. *Id.*, Vol. I at 71. Yet defendants never asserted that punitive damages should not be at issue until

after all of the evidence had been presented to the arbitrator.[3]

D. The District Court correctly confirmed the arbitration award, because the arbitrator neither manifestly disregarded the law nor violated public policy.

Next, defendants argue that the district court erred in confirming the arbitration award because the arbitrator manifestly disregarded the law and violated public policy. When reviewing a district court's decision to confirm or vacate an arbitration award, we review legal questions de novo and factual findings for clear error. *See Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 931 (10th Cir. 2001). We owe no deference to the district court's decision. *See ARW Exploration Corp.*, 45 F.3d at 1462. But we afford great deference to the arbitrator's decision. *U.S. Energy Corp. v. Nukem, Inc.*, 400 F.3d 822, 830 (10th Cir. 2005). Our review is "strictly limited," and "this highly deferential standard has been described as among the narrowest known to the law." *Bowen*, 254 F.3d at 932 (quotation marks omitted).

We have held consistently that we may vacate an arbitration award only under the limited circumstances set forth in the FAA, 9 U.S.C. § 10,[4] or under

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[3] Because, as discussed earlier, the district court correctly determined that this case should be decided by arbitration, we reject defendants' argument that the district court denied them a jury trial.

[4] Under § 10, we may vacate an arbitration award

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

certain judicially-created exceptions, such as an arbitrator's manifest disregard for the law or for a violation of public policy. *See, e.g., Lewis v. Circuit City Stores, Inc.*, 500 F.3d 1140, 1150 (10th Cir. 2007); *Hollern*, 458 F.3d at 1172; *Sheldon v. Vermonty*, 269 F.3d 1202, 1206 (10th Cir. 2001); *Bowen*, 254 F.3d at 932 & n.3; *see also, e.g., MACTEC, Inc. v. Gorelick*, 427 F.3d 821, 827 (10th Cir. 2005) (listing statutory grounds for vacatur and recognizing that Supreme Court has held that vacatur is proper when arbitrator manifestly disregards law); *U.S. Energy Corp.*, 400 F.3d at 830 (stating that "arbitral award is subject to reversal only if it evinces a 'manifest disregard' of the law"); *Jenkins v. Prudential-Bache Sec., Inc.*, 847 F.2d 631, 633-34 (10th Cir. 1988) ("[F]ederal courts have never limited their scope of review to a strict reading of [§ 10]. Viewed either as an inherent appurtenance to the right of judicial review or as a broad interpretation of [§10(d)] prohibiting arbitrators from exceeding their powers, the arbitration award has traditionally been subjected to a short of 'abuse of discretion' standard.").

Last year, the Supreme Court held in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 128 S. Ct. 1396, 1400, 1401, 1403, 1404 (2008), that the FAA sets forth the exclusive grounds for vacating or

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> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of the party have been prejudiced; or
>
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a).

modifying an arbitration award under the FAA, 9 U.S.C. §§ 10 and 11.[5] The Court rejected Hall Street Associates' assertion that *Wilko v. Swan*, 346 U.S. 427, 436-37 (1953), recognized manifest disregard of the law as an independent basis for vacatur beyond § 10. *Hall Street Assocs.*, 128 S. Ct. at 1403-04. Instead, the Court noted that the issue was not directly presented in *Wilko* and the language of *Wilko* is vague:

> Maybe the term "manifest disregard" was meant to name a new ground for review, but maybe it merely referred to the § 10 grounds collectively, rather than adding to them. Or, as some courts have thought, "manifest disregard" may have been shorthand for § 10(a)(3) or § 10(a)(4), the subsections authorizing vacatur when the arbitrators were "guilty of misconduct" or "exceeded their powers."

Hall Street Assocs., 128 S. Ct. at 1404 (citations omitted). The Court, therefore, decided that the text of the FAA "compels a reading" that the statute sets forth exclusive grounds for review. *Id.*

We have not addressed whether judicially-created grounds for vacatur survive after *Hall Street Associates*.[6] Other courts, however, have addressed the issue and have reached differing conclusions.

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[5] The question in *Hall Street Associates*, 128 S. Ct. at 1400-01, was whether a contract may supplement the statutory grounds for vacatur or modification of an arbitration award set forth in 9 U.S.C. §§ 9-11 to allow the federal court to review de novo the legal conclusions of the arbitrator. The Court refused to expand the detailed categories of §§ 10 and 11, which set forth "extreme arbitral conduct," to "review for just any legal error." *Hall St. Assocs.*, 128 S. Ct. at 1404-05.

[6] In *Youngs v. American Nutrition, Inc.*, 537 F.3d 1135, 1141 (10th Cir. 2008), we did not cite *Hall Street Associates*. But we

Some courts have decided that manifest disregard of the law is no longer an independent ground for vacating arbitration awards under the FAA. *See, e.g.*, *Citigroup Global Mkts., Inc. v. Bacon*, 562 F.3d 349, 350, 355 (5th Cir. 2009) ("*Hall Street* unequivocally held that the statutory grounds are the exclusive means for vacatur under the FAA. Our case law defines manifest disregard of the law as a *nonstatutory* ground for vacatur. . . . Thus, to the extent that manifest disregard of the law constitutes a nonstatutory ground for vacatur, it is no longer a basis for vacating awards under the FAA."); *Ramos-Santiago v. United Parcel Serv.*, 524 F.3d 120, 124 n.3 (1st Cir. 2008) (acknowledging in dicta holding in *Hall Street Associates* "that manifest disregard of the law is not a valid ground for vacating or modifying an arbitral award in cases brought under the Federal Arbitration Act"); *see also AIG Baker Sterling Heights, LLC v. Am. Multi-Cinema, Inc.*, 579 F.3d 1268, 1271 (11th Cir. 2009) (noting that *Hall Street Associates* "confirmed[that §§] 10 and 11 of the FAA offer the exclusive grounds for expedited vacatur or modification of an award under the statute"); *Grain v. Trinity Health, Mercy Health Servs. Inc.*, 551 F.3d 374, 380 (6th Cir. 2008)

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required the party seeking to vacate the arbitration award "to show that one of the limited statutory grounds exists for setting aside the arbitration result." *Youngs*, 537 F.3d at 1141 (citing to both Utah and federal law). The issue of the applicability of the manifest disregard doctrine was not at issue or addressed.

And in *DMA International, Inc. v. Qwest Communications International, Inc.*, 585 F.3d 1341, 2009 WL 3627941, at *2 & n.2 (10th Cir. Nov. 4, 2009), we declined to decide whether manifest disregard remains valid law. Instead, we decided that "the arbitrator did not act with manifest disregard of the law or in any other way that would justify vacatur" of the arbitrator's award. *Id.* at *2 n.2.

("It is true that we have said that 'manifest disregard of the law' may supply a basis for *vacating* an award, at times suggesting that such review is a 'judicially created' supplement to the enumerated forms of FAA relief. . . . *Hall Street's* reference to the 'exclusive' statutory grounds for obtaining relief casts some doubt on the continuing vitality of that theory. But either way, we have used the 'manifest disregard' standard only to vacate arbitration awards, not to modify them."), *cert. denied*, 130 S. Ct. 96 (2009); *Crawford Group, Inc. v. Holekamp*, 543 F.3d 971, 976 (8th Cir. 2008) (citing *Hall Street Associates* and stating that "[a]n arbitral award may be vacated only for the reasons enumerated in the FAA").

The Second Circuit has recognized that *Hall Street Associates* held that the statute sets forth exclusive grounds for vacating arbitration awards, but, nonetheless, decided that manifest disregard is a "judicial gloss on the specific grounds for vacatur enumerated in section 10 of the FAA, [and therefore] remains a valid ground for vacating arbitration awards." *Stolt-Nielsen SA v. AnimalFeeds Int'l Corp.*, 548 F.3d 85, 94 (2d Cir. 2008), *cert. granted*, 129 S. Ct. 2793 (2009).[7] In reaching this conclusion, the Second Circuit realized that this holding conflicted with dicta in its prior cases treating manifest disregard as a ground for vacatur separate from the grounds listed in the FAA. *Id.* Further, the Second Circuit decided that the Supreme Court did not entirely abrogate the manifest-disregard doctrine, since the Court "speculated" that

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[7] Certiorari was granted on an unrelated question: "Whether imposing class arbitration on parties whose arbitration clauses are silent on that issue is consistent with the" FAA. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 2009 WL 797583 (certiorari petition).

manifest disregard referred to the § 10 grounds. *Id.* at 94-95.

The Ninth Circuit has held that manifest disregard remains a valid ground for vacatur in that circuit because it had already treated manifest disregard as a part of § 10(a)(4). *Comedy Club, Inc. v. Improv W. Assocs.*, 553 F.3d 1277, 1290 (9th Cir. 2009), *cert. denied*, 130 S. Ct. 145 (2009). The court joined the Second Circuit in its interpretation of *Hall Street Associates*. *Comedy Club*, 553 F.3d at 1290 (citing *Stolt-Nielsen*).

We need not decide whether § 10 provides the exclusive grounds for vacating an arbitrator's decision, because defendants demonstrate neither manifest disregard of the law nor violation of public policy. "Manifest disregard of the law has been defined as willful inattentiveness to the governing law. To warrant setting aside an arbitration award based on manifest disregard of the law, the record must show the arbitrators knew the law and explicitly disregarded it." *Hollern*, 458 F.3d at 1176 (quotation marks omitted). Further, the public policy exception applies only to contract disputes; it does not apply to tort claims. *Bowen*, 254 F.3d at 932 n.3.

According to defendants, they had a good-faith basis to ask the Colorado and Tennessee attorneys general to investigate bank fraud, yet the arbitrator acted in manifest disregard of the law and in violation of public policy by deciding that there was no bank fraud without considering the good-faith issue. Under Tennessee law, the issue in defamation cases is what a reasonably prudent person would have done to ascertain the truth or falsity of a communication. *Pate v. Serv. Merch. Co.*, 959 S.W.2d 569, 574-75 (Tenn. Ct. App. 1996). The arbitrator did not disregard this

law, as he specifically determined that defendants' actions were unreasonable.

In addition, defendants argue that the arbitrator manifestly disregarded Tennessee law indicating that there can be no liability for reporting financial fraud to a government agency or for communicating matters of concern to government agencies. *See* Tenn. Code Ann. §§ 39-14-909, 4-21-1002(a). Rather, they contend the arbitrator disregarded this law and imposed an obligation on them to prove bank fraud by a preponderance of the evidence before making a report to a government agency.

Arbiter Dubofsky decided that the Tennessee anti-SLAPP statute did not provide immunity because defendants reported bank fraud to retaliate against Mr. Hicks; they negligently and recklessly failed to investigate; they falsely, recklessly, and negligently accused Mr. Hicks of committing crimes; and Mr. Cadle admitted there was no bank fraud. *See id.* § 4-21-1003(b) (stating anti-SLAPP immunity does not apply if person providing information knew it was false, communicated information in reckless disregard of its falsity, or acted negligently in failing to determine if the information was false). Likewise, Arbiter Dubofsky decided that defendants did not have a reasonable subjective or objective belief that Mr. Hicks perjured himself. Defendants therefore have failed to show a manifest disregard of the law.

Defendants also claim that the arbitrator manifestly disregarded the law by (1) validating the oral side agreement and determining there was no bank fraud and (2) deciding that they were liable for defamation even though the letters to the attorneys general were not defamatory since there was not a single false statement in them. In these arguments, defen-

dants are merely disagreeing with the arbitrator's decision. These, therefore, are not reasons to vacate the arbitrate award for a manifest disregard of the law.

Further, defendants argue that the arbitrator improperly awarded damages based on Mr. Cadle's alleged attacks upon others. Evidence of attacks on others, namely Arbitrator Hinga and Mr. Hicks's counsel, is relevant to show that defendants intended to harm Mr. Hicks. *See Phillip Morris USA v. Williams*, 549 U.S. 346, 355, 357 (2007) (deciding evidence of harm to others is relevant to show reprehensibility, but cannot be used to punish defendant for harms to nonparties).

Finally, defendants argue that the arbitrator exceeded his powers and manifestly disregarded the law by assessing punitive damages against them when Mr. Hicks never sought punitive damages. We have already determined that the arbitrator acted within the scope of his authority, and as a result, we reject the contention.

E. The district court applied the proper deferential standard of review.

Defendants argue that the district court improperly made an independent inquiry into the underlying facts of the case and validated the arbitrator's finding that Mr. Hicks had an oral side agreement with a Bank of America employee that contradicted the terms of the note. According to defendants, the district court was limited to deciding whether the arbitrator manifestly disregarded the law.

It is true, as defendants argue, that courts may not independently review an arbitrator's decision on the merits, even when there are allegations of factual

errors and misinterpretation of the parties' agreement. *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509 (2001); *Bowen*, 254 F.3d at 932. But our review of the district court's order convinces us that the district court did not find facts or specifically validate Arbitrator Dubofsky's rulings. Instead, the court merely recited the facts and confirmed the arbitrator's decision, all while applying the proper deferential standard of review.

F. The district court misapplied Tennessee law on post-award prejudgment interest.

On cross appeal, Mr. Hicks argues that under Tennessee law he is entitled to post-award, prejudgment interest in the amount of $394,119.51 on the two final arbitration awards. He contends the district court denied this interest based on an erroneous interpretation of Tennessee law that post-award, prejudgment interest is not recoverable on personal injury verdicts. Because the arbitration awards were meant to compensate him as of the dates they were issued, Mr. Hicks maintains that he should be granted post-award, prejudgment interest that would compensate him for the delay between the award and its confirmation and entry of judgment.

State law applies when determining the issue of prejudgment interest. *See Strickland Tower Maint., Inc. v. AT&T Commc'ns, Inc.*, 128 F.3d 1422, 1429 (10th Cir. 1997). We review the district court's interpretation of state law de novo. *Beardsley v. Farmland Co-Op, Inc.*, 530 F.3d 1309, 1313 (10th Cir. 2008).

The district court decided and the Tennessee law is clear that prejudgment interest may not be awarded in personal injury actions. *See Francois*, 205 S.W.3d at 916. But the court did not recognize that principles

of equity also govern when awarding prejudgment interest in a Tennessee case. *Myint v. Allstate Ins. Co.*, 970 S.W.2d 920, 927 (Tenn. 1998). In deciding whether an award is equitable under the circumstances of the particular case, "a court must keep in mind that the purpose of awarding the interest is to fully compensate a plaintiff for the loss of the use of funds to which he . . . was legally entitled, not to penalize a defendant for wrongdoing." *Id.* The certainty of a claim is "one of many nondispositive facts to consider when deciding whether prejudgment interest is, as a matter of law, equitable under the circumstances." *Id.* at 928; *see also id.* ("[T]he more clear the fact that the plaintiff is entitled to compensatory damages, the more clear the fact that the plaintiff is also entitled to prejudgment interest as part of the compensatory damages."). Prejudgment interest is "based on the recognition that a party is damaged by being forced to forego the use of its money over time." *Scholz v. S.B. Int'l, Inc.*, 40 S.W.3d 78, 82 (Tenn. Ct. App. 2000).

Mr. Hicks is not seeking prejudgment interest for the period of time prior to the arbitrators' awards. *See Louisville & N. R.R. v. Wallace*, 17 S.W. 882, 883 (Tenn. 1891) (deciding award was "measure of recovery" in personal injury action). Instead, he seeks the interest from the time of the arbitration awards until the entry of judgment. This interest would compensate him for the loss of the use of the money after its award. Here, the lengthy delay between the time of the arbitrators' awards and the entry of judgment justifies an award of post-award, prejudgment interest. *See Lawson v. State*, No. 03A01-9806-BC-00185, 1998 WL 880931, at *3 (Tenn. Ct. App. Dec. 17, 1998) (unpublished). We must reverse and remand this claim to the district court.

III. CONCLUSION

We AFFIRM the district court's judgment confirming the arbitration awards and REVERSE the district court's vacatur of post-award, prejudgment interest. We REMAND to the district court to amend its judgment to award post-award, prejudgment interest of $394,119.51.

Entered for the Court

Robert H. Henry
Chief Circuit Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior Judge Zita L. Weinshienk

Civil Action No. 04-cv-02616-ZLW-KLM

KERRY R. HICKS,

Plaintiff,

v.

THE CADLE COMPANY, BUCKEYE RETIREMENT CO., LLC, LTD., WILLIAM E. SHAULIS, AND DANIEL C. CADLE,

Defendants.

ORDER

The matters before the Court are: (1) Plaintiff's Motion To Confirm Phase II Arbitration Award And To Enter Judgment For Phase I And II Awards (Doc. No. 162), (2) Defendant Daniel C. Cadle's Motion To Vacate Phase II Arbitration Award (Doc. No. 197), and (3) the Motion To Vacate Arbitration Award filed by Defendants The Cadle Company, Buckeye Retirement Co., LLC. Ltd., and William E. Shaulis (Doc. No. 199). The Court has reviewed carefully the moving and responding papers and the applicable legal authority.

I. Background

This case arises from a dispute concerning collection activities on a promissory note. On December 3, 2004, Plaintiff Kerry R. Hicks filed a Complaint in State Court in Denver against Defendants The Cadle Com-

pany; Buckeye Retirement Co., LLC. LTD. (Buckeye); William E. Shaulis; Daniel C. Cadle; and Bank of America, N.A. (Bank or BOA). The action was removed to this Court on December 20, 2004. In his Complaint, Plaintiff alleged that in 1999, he and other officers of a company called Specialty Care Network (SCN) borrowed $3,550,000 from the Bank via a promissory note dated December 31, 1999 (Note). Plaintiff's portion of the loan responsibility was $2 million individually and $350,000 jointly with another officer, Patrick Jaeckle, as guarantors for SCN. Walter Choppin, a Senior Vice President of Bank of America, agreed to this division of liability. However, just before the transaction was to close, Choppin faxed Plaintiff a version of the Note which reflected that Plaintiff and Jaeckle were jointly and severally liable on the entire value of the Note. Choppin told Plaintiff not to worry, because Plaintiff's liability under the Note was limited to $2 million as had been discussed, but that the Bank simply needed Plaintiff's signature "for processing requirements" until Jaeckle's collateral was perfected. Plaintiff executed the Note.

The Note contains an arbitration provision which states in part that,

> ANY CONTROVERSY OR CLAIM BETWEEN OR AMONG THE PARTIES HERETO INCLUDING BUT NOT LIMITED TO THOSE ARISING OUT OF OR RELATING TO THIS INSTRUMENT . . . INCLUDING ANY CLAIM BASED ON OR ARISING FROM AN ALLEGED TORT, SHALL BE DETERMINED BY BINDING ARBITRATION . . . .[1]

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[1] Doc. No. 162-2 at 4.

Plaintiff paid $2 million on the Note in January 2000 and SCN paid off its $350,000 liability. Choppin told Plaintiff that Plaintiff's name would be taken off of the Note once Jaeckle's collateral was perfected. The Note was renewed twice, ultimately reflecting a remaining principal amount of $1 million. Choppin told Plaintiff that Jaeckle was solely responsible for the $1 million balance, but that Plaintiff's signature was required until Jaeckle's collateral could be perfected. However, Jaeckle's collateral was never perfected, and Jaeckle never paid on the Note.

In October 2002, the Bank sold the Note to The Cadle Company, which immediately commenced collection efforts against Plaintiff. Plaintiff's attorney wrote to The Cadle Company and the Bank explaining that Plaintiff had no liability on the Note, and the Bank thereafter informed The Cadle Company that by the time the Note was sold to The Cadle Company, the Bank had concluded that Plaintiff was not obligated under the Note, which conclusion was conveyed to The Cadle Company when the Note was sold. The Cadle Company nonetheless continued its collection efforts against Plaintiff.

In September of 2003, The Cadle Company, through Buckeye, sued Plaintiff for default on the Note in U.S. District Court in Tennessee, despite the arbitration provision in the Note. The Bank ultimately repurchased the Note, at which point Plaintiff apparently was dismissed from the Tennessee action. The Bank then sold the Note to a third party. Thus, none of the Defendants in this action are current holders of the Note.

On October 23, 2003, Plaintiff initiated arbitration proceedings before JAMS, asserting claims against The Cadle Company and Buckeye for filing what he

claimed to be the vexatious and frivolous Tennessee lawsuit, against Buckeye for abuse of process based on the Tennessee suit, for defamation based on The Cadle Company/Buckeye's statements to a third party that Plaintiff was liable on the Note, and for a declaration that Plaintiff is not liable on the Note. Plaintiff also asserted claims against the Bank.

Plaintiff filed the present action in state court on December 3, 2004, just over a year into the arbitration. The action was removed to this Court, and Plaintiff thereafter filed an Amended Complaint on January 13, 2005, alleging that in September 2004, after the Bank had repurchased the Note, Shaulis, a Vice President of The Cadle Company, acting of behalf of The Cadle Company, Buckeye, and Daniel Cadle, submitted allegations of bank fraud against Plaintiff to the Attorneys General of Colorado and Tennessee. Contending that Shaulis' purpose in doing so was to intimidate Plaintiff in order to gain leverage in the ongoing arbitration proceeding, Plaintiff asserted claims of abuse of process, defamation *per se*, and intentional infliction of emotional distress. On January 14, 2005, the Court stayed this action pending the completion of the ongoing arbitration.

On January 25, 2005, the JAMS arbitrator, James D. Hinga, ordered that the claims asserted in Plaintiff's Second Amended Demand For Arbitration would be heard at the arbitration hearing set for February 1-4, 2005, and that the additional issues raised in (1) Plaintiff's Third Amended Demand For Arbitration,[2] (2) Cadle and Buckeye's counterclaims for tortious interference and abuse of process, and (3) the claims

[2] The Third Amended Demand For Arbitration asserted additional claims against the Bank.

in Plaintiffs Amended Complaint filed in this Court were bifurcated and stayed pending completion of the February 1-4, 2005, arbitration hearing.[3] Thus, as Defendants have described them, the "Phase I" arbitration claims were based on the Bank's sale of the Note to The Cadle Company and Defendants' filing of the Tennessee lawsuit, while the "Phase II" arbitration claims were based upon (1) Defendants' lodging of criminal allegations of bank fraud against Plaintiff and (2) Defendants' counterclaims for abuse of process (based upon Plaintiffs filing of this lawsuit) and tortious interference (based on Plaintiff's denial of liability on the Note in communications to the Bank).

On April 4 and 28, 2005, Arbitrator Hinga entered an Arbitration Award and Final Arbitration Award on Phase I of the arbitration. The arbitrator dismissed Plaintiff's claims against the Bank and awarded Plaintiff damages of $400,000 against The Cadle Company and Buckeye jointly and severally, plus attorney's fees. Arbitrator Hinga wrote that the filing of the Tennessee action was "offensive" in light of the arbitration clause and that The Cadle Company and Buckeye's conduct was "outrageous" and "beyond all norms of debt collection activity." This Court confirmed the arbitration award on October 26, 2005, deferring entry of judgment until all of the claims in the case were resolved. The Tenth Circuit affirmed.[4]

Phase II of the arbitration was heard by Arbitrator Hinga on February 28-March 3, 2006. However, Arbitrator Hinga passed away on March 5, 2006, prior to issuing any final order or award. A new arbitration

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[3] *See* Doc. No. 139 at 2-3.

[4] *Hicks v. Bank of America, N.A.*, 2007 WL 521175 (10th Cir. February 21, 2007) (unpublished).

hearing then went forward on October 10-12, 2006, before Retired Judge Frank N. Dubofsky as arbitrator. On May 14, 2007, Judge Dubofsky issued his Order, ruling in Plaintiff's favor on Plaintiff's defamation and emotional distress claims, against Plaintiff on Plaintiff's abuse of process claim, and against Defendants on all of their counterclaims. Citing to Defendants' letters to the Colorado and Tennessee Attorneys General, as well as numerous other letters and communications from Shaulis and Daniel Cadle to various governmental bodies from 2004 to 2006 accusing Plaintiff of illegal conduct, the arbitrator's strongly worded Order stated that Defendants had "engaged in a relentless campaign to defame, intimidate and harass Hicks by raising alleged bank fraud, perjury and other serious allegations against Hicks . . . ."[5] The purpose of this campaign, Judge Dubofsky wrote, was to "retaliate against Hicks for respondents' loss of a business relationship with BOA (which respondents caused), for contesting Cadle's position, [to try to] to force Hicks to compromise his civil claims in order to avoid criminal prosecution, and to intimidate others involved in the process."[6] Judge Dubofsky commented that he had

> never seen a party to a lawsuit engage in such relentless, protracted and destructive conduct to harm another individual. Here, despite the knowledge that there was no bank fraud, Cadle has shown no remorse for the criminal allegations of bank fraud, and he intends to continue

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[5] Doc. No. 162-3 at 6-7.

[6] *Id.* at 7 (footnote omitted).

> making such allegations even after the conclusion of this arbitration.[7]

Judge Dubofsky stated that "Hicks has a legitimate fear that Cadle will not stop his efforts until Hicks is destroyed financially, psychologically, and personally."[8] Ultimately, Judge Dubofsky awarded Plaintiff $750,000 in compensatory damages, stating that the award is against Daniel Cadle but that Buckeye and The Cadle Company are jointly and severally liable, and $950,000 in punitive damages against Daniel Cadle, The Cadle Company, and Buckeye. He awarded $200,000 in compensatory damages against Shaulis, to be reduced to $1 if Plaintiff and Shaulis are able to so stipulate. He also awarded $10,000 in additional punitive damages against Shaulis, Buckeye, and The Cadle Company, also to be reduced to $1 if Plaintiff and Shaulis are able to so stipulate. In a separate Ruling On Affirmative Defenses, Judge Dubofsky rejected all of Defendants' affirmative defenses. Judge Dubofsky thereafter issued a Final Award on June 18, 2007, incorporating his prior Order and Ruling on Affirmative Defenses and stating that The Cadle Company and Buckeye are jointly and severally liable on the $200,000 award against Shaulis, and awarding prejudgment and post-judgment interest. Plaintiff thereafter filed the present motion to confirm the Final Award,[9] and Defendants moved to vacate it.

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[7] *Id.* at 18-19.

[8] *Id.* at 14.

[9] "Final Award" as used herein shall refer collectively to the May 14, 2007, Order, the May 14, 2007 and Ruling On Affirmative Defenses, and the June 18, 2007, Final Award.

On October 29, 2007, Plaintiff filed a Supplemental Complaint pertaining to alleged conduct by The Cadle Company, Buckeye, and Daniel Cadle occurring after the date of Judge Dubofsky's Final Award. The Court has referred the claims in the Supplemental Complaint to arbitration, and the arbitration apparently is pending.

II. Legal Standard

Judicial review of an arbitration award is highly deferential and strictly limited.[10] The Court must "give extreme deference to the determination of the arbitration panel for the standard of review of arbitral awards is among the narrowest known to law."[11] "Once an arbitration award is entered, the finality of arbitration weighs heavily in its favor and cannot be upset except under exceptional circumstances."[12] Courts do not consider the merits of the underlying claims in arbitration, even when the basis for the arbitrator's decision is ambiguous,[13] and an erroneous interpretation or application of law by the arbitrator is not reversible.[14] This is "[b]ecause a primary purpose behind arbitration agreements is to avoid the

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[10] *See Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 932 (10th Cir. 2001); *U.S. Energy Corp. v. Nukem*, 400 F.3d 822, 830 (10th Cir. 2005).

[11] *Hollern v. Wachovia Securities, Inc.*, 458 F.3d 1169, 1172 (10th Cir. 2006) (quoting *Brown v. Coleman Co.*, 220 F.3d 1180, 1182 (10th Cir. 2000)).

[12] *Id.* (quoting *Ormsbee Dev. Co. v. Grace*, 668 F.2d 1140, 1146-47 (10th Cir. 1982)).

[13] *See W.R. Grace and Co. v. Local Union 759*, 461 U.S. 757, 764 (1983).

[14] *ARW Exploration Corp. v. Aguirre*, 45 F.3d 1455, 1463 (10th Cir. 1995).

expense and delay of court proceedings."[15] The Fourth Circuit Court of Appeals has explained that, "[i]n arbitration cases, courts must break with their usual habit of scrupulously examining the underlying merits of the dispute. Ordinarily, the reviewing court's task is to enforce the bargained-for decision of the arbitrator and not to evaluate the arbitrator's factual findings or legal analysis."[16]

The Federal Arbitration Act (FAA)[17] provides that an arbitration award may be vacated only:

> (1) where the award was procured by corruption, fraud, or undue means;
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> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
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> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
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> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

Additionally, courts have held than an award may be vacated based upon a showing of violations of public

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[15] *Id.* (quoting *Foster v. Turley*, 808 F.2d 38, 42 (10th Cir. 1986)).

[16] *Richmond, Fredericksburg & Potomac R.R. Co. v. Transportation Communications Int'l Union*, 973 F.2d 276, 281 (4th Cir. 1992).

[17] 9 U.S.C. § 10(a).

policy, manifest disregard of the law, or denial of a fundamentally fair hearing.[18] Manifest disregard of the law means "willful inattentiveness to the governing law."[19] Legal error or misunderstanding of the law is not sufficient; the arbitrator must have known the applicable law and explicitly disregarded it.[20]

III. Analysis

A. Jurisdiction of the Arbitrator

Plaintiff moves to confirm the Final Award pursuant to 9 U.S.C § 9.[21] Defendants oppose the motion and move to vacate it on numerous grounds.[22] First, Defendants contend that Judge Dubofsky exceeded his jurisdiction because Shaulis and Daniel Cadle, individually, were not parties to the Note and thus not subject to its arbitration provision. This issue already has been addressed and resolved by this Court. In the Order of March 23, 2005, clarifying its prior Order staying the action pending arbitration, this Court stated:

> In their Joinder In Bank Of America's, N.A., Motion To Stay The Action Pending Completion

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[18] *Denver & Rio Grande W. R.R. Co. v. Union Pacific R.R. Co.*, 119 F.3d 847, 849 (10th Cir. 1997).

[19] *Bowen*, 254 F.3d at 932.

[20] *Id.*

[21] 9 U.S.C. § 9 states that "any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court may grant such an order . . . ."

[22] Although Defendant Daniel Cadle briefed the present motions separately from the other Defendants, the Court herein refers collectively to "Defendants'" arguments, since all of the Defendants' arguments are similar if not overlapping and Daniel Cadle expressly incorporated by reference the other Defendants' responsive arguments into his briefing. *See* Doc. No. 182 at 7.

Of Ongoing Arbitration (Joinder), Defendants asserted that "[t]his action must proceed to arbitration as the arbitration clause in the Promissory Note clearly encompasses all issues and claims asserted by Hicks."

Although not styled as a formal motion to compel arbitration, perhaps because an arbitration proceeding already was pending, Defendants' statement that this action must proceed to arbitration in essence requested the Court to compel the parties to arbitrate. By making the request, all Defendants consented to the jurisdiction of the arbitrator for resolution of all claims set forth in the Amended Complaint. In staying this action, the Court relied on this consent so that, as requested by Defendants, all claims among the parties to this action could be arbitrated. Therefore, judicial estoppel precludes any of the Defendants from claiming that they are not subject to the arbitrator's jurisdiction for resolution of the claims in the Amended Complaint.

The refusal of Shaulis and Cadle to submit to the jurisdiction of the arbitrator is clearly inconsistent with the position they took earlier in their Joinder. They succeeded in persuading the Court to accept their position that the arbitration provision encompassed the claims against them; therefore, sustaining their inconsistent position before the arbitrator would create the perception that either the Court or the arbitrator has been misled. Finally, if not estopped, Shaulis and Cadle would "derive an unfair advantage or impose an unfair detriment on" Plaintiff by delaying

> Plaintiff's right to proceed against them in this action without further delay.[23]

The Tenth Circuit cited to the Court's March 23, 2005, Order in concluding that The Cadle Company was estopped from claiming that it was not subject to arbitration since all of the Defendants had argued that the Note encompassed all of Plaintiff's claims.[24] This conclusion applies equally to Defendants Shaulis and Daniel Cadle as to The Cadle Company. The Court finds that the arbitrator properly exercised jurisdiction over the individual Defendants.

Defendants also argue that the parties never agreed or intended that the arbitration cover torts, and that Plaintiff's tort claims could not, in any event, be arbitrated because those claims concerned "subsequent" acts, meaning, apparently, acts which took place after Plaintiff's original statement of claims was filed. However, the Note's arbitration provision expressly requires arbitration of "any controversy or claim between or among the parties hereto including but not limited to those arising out of or relating to this instrument . . . including any claim based on or arising from an alleged tort . . ."[25] Additionally, on January 15, 2007, Judge Dubofsky granted Plaintiff's motion to amend his complaint to conform to the evidence, allowing evidence of the letters and other

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[23] Doc. No 19 at 2-3 (internal citations omitted).

[24] *See Hicks*, 2007 WL 521175 at *5 (concluding that The Cadle Company was subject to the jurisdiction of the arbitrator because "Cadle defendants [defined earlier in the opinion as The Cadle Company, Buckeye, Shaulis, and Daniel Cadle asserted that this action must be arbitrated because the arbitration clause in the note clearly encompassed all of the issues and claims that Hicks asserted.")

[25] Doc. No. 162-2 at 4.

communications to government agencies alleging illegal conduct by Plaintiff which were sent "subsequent to the original matter which gave rise to the arbitration."[26] Judge Dubofsky reasoned that this evidence raised issues similar to those in the arbitration and "there is a risk [that it] could be the basis for additional arbitration complaints and claims."[27] Although The Cadle Company no longer holds the Note, the arbitration provision survives the expiration of the Note,[28] and the parties' dispute concerning Plaintiff's liability on the Note and Defendants' efforts to collect on it was the genesis of, and is factually intertwined with, Defendants' letter-writing campaign against Plaintiff which is the subject of Plaintiff's tort claims. Finally, citing to *Koch v. Compucredit Corp.*,[29] an unpublished case from the U.S. District Court for the Eastern District of Arkansas, Defendants argue that if Plaintiff had no remaining debt under the Note, then there was no remaining agreement to arbitrate under the Note. Defendants do not cite, and the Court has not found, any controlling authority setting forth such a rule. Regardless, the Court agrees with Plaintiff that *Koch* is distinguishable, since it was undisputed in *Koch* that no debt remained on the Note at the time the Note was assigned. In the present case, there was no agreement that Plaintiff had been released from liability under the Note at the time the Note was assigned, or at the time that arbitration was commenced.

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[26] Doc. No. 195-5 at 2.

[27] *Id.*

[28] *See Riley Mfg. Co., Inc. v. Anchor Glass Container Corp.*, 157 F.3d 775, 782 (10th Cir. 1998).

[29] 2007 WL 991070 (E.D. Ark. 2007) (unpublished).

B. Manifest Disregard of the Law

Defendants argue that Judge Dubofsky manifestly disregarded the law in numerous ways. First, Defendants argue that Judge Dubofsky disregarded the Tennessee parol evidence rule and statute of frauds[30] by "validating" Plaintiff's assertion of an oral side agreement with the Bank. Defendants cite to case law in which courts have applied the Tennessee statute of frauds to hold borrowers liable on notes despite alleged oral agreements relieving them of such liability.[31] A review of the arbitration award reveals that Judge Dubofsky did not, however, disregard the statute of frauds and related case law; rather, he expressly stated that the statute of frauds "has little, if any, significance in determining the fraud issue," since "even if the statute of frauds bars enforcement of the oral understanding, Hicks did not engage in fraud."[32] Defendants do not address this specific conclusion, and do not otherwise explain how

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[30] Tenn. Code Ann. § 29-2-101(b)(1). The Note states that it shall be governed by and interpreted in accordance with Tennessee law (*see* Doc. No. Doc. No. 162-2 at 3), and Tennessee law was applied in the arbitration.

[31] *See Bilyeu v. Volunteer State Bank*, 2006 WL 1005130 (Tenn. Ct. App. Apr. 17, 2006) (unpublished); *In re Sallee*, 286 F.3d 878 (6th Cir. 2002); *Huntington Nat. Bank v. Hooker*, 840 S.W.2d 916 (Tenn. App. 1991); *Farmers & Merchants Bank v. Petty*, 664 S.W. 2d 77 (Tenn. App. 1983).

[32] Doc. No. 162-3 at 13 (emphasis added). In addressing a similar argument made by Defendants with respect to confirmation of the Phase I award, the Tenth Circuit wrote, "[a]ssuming arguendo that Cadle defendants are correct that the arbitrator erroneously applied the parol evidence rule and sidestepped the note's integration clause, a finding that Hicks was not liable on the note is not a predicate to finding that Cadle defendants engaged in abuse of process." *Hicks*, 2007 WL 521175 at *5.

an application of the statute of frauds or parol evidence rule could determine any legal claim at issue in this case. Defendants' argument does not provide grounds for vacating the arbitrator's award.

Defendants also argue that Judge Dubofsky exceeded his powers and manifestly disregarded the law by purporting to decide the issue of Plaintiff's criminal liability for bank fraud. Defendants submit that an arbitrator cannot "prosecute" or "render judgment on" Plaintiff's guilt or innocence of bank fraud, since that is the job of the appropriate authorities. However, Judge Dubofsky did not purport to enter a criminal judgment on the issue of bank fraud. Rather, he was required to address whether Defendants' letters alleging that Plaintiff had committed bank fraud were true in order to rule on Defendants' own affirmative defense of truth on the defamation claim, and he did so.

Defendants go on to argue that Plaintiff did in fact commit bank fraud when he "repeatedly executed promissory notes never intending to be bound and supposedly subject to an assurance that he never intended to repay it."[33] However, the arbitrator found that the record was replete with evidence of Plaintiff and Choppin's oral agreement, and correctly concluded that "[i]f a senior vice president makes an oral agreement to a borrower in apparent derogation of the terms of a written contract, the borrower does not commit bank fraud or perjury when he adheres to the oral agreement."[34] "BOA agreed to the limitations on Hicks' liability. BOA has acknowledged that it was

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[33] Doc. No. 181-2 at 22; *see also* Doc. No. 199 at 3-6.

[34] Doc. No. 162-3 at 26-27.

not a victim of bank fraud."[35] Defendants present no argument undermining the arbitrator's sound conclusion, and otherwise have failed to show that the arbitrator engaged in "willful inattentiveness to the governing law"[36] with regard to the issue of bank fraud.

Defendants further contend that Judge Dubofsky manifestly disregarded the law by granting Plaintiff's motion to amend his claims to conform to the evidence. Defendants also characterize this issue as a "refus[al] to hear evidence pertinent and material to the controversy" pursuant to 9 U.S.C. § 10(a)(3).[37] Plaintiff's motion to amend sought to allow consideration of Shaulis and Daniel Cadle's letters and phone calls to various authorities alleging criminal conduct and wrongdoing by Plaintiff which were sent or made after the September 2004 letters to the Tennessee and Colorado attorneys general. Defendants contend that the arbitrator ignored the relevant law,[38] citing to *Ellis v. Arkansas Louisiana Gas Co.*,[39] in which the Tenth Circuit stated that "[t]he test for determining whether the pleadings should be deemed amended is whether the opposing party had a fair opportunity to defend and whether it could offer additional evidence if the case were retried on the

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[35] *Id.* at 11.

[36] *Bowen*, 254 F.3d at 932.

[37] *See* Doc. No. 181-2 at 24-25.

[38] *See id.* at 22 n.14.

[39] 609 F.2d 436 (10th Cir. 1979). The Court notes that throughout their briefing, Defendants have failed to comply with D.C.COLO.LCivR 7.1.D. ("Every citation in a motion, response or reply shall include the specific page . . . to which reference is made.")

different theory."[40] In his order granting Plaintiff's motion, the arbitrator stated that "I essentially agree with claimant that respondents have failed to make an adequate offer of proof as to what additional evidence they would have provided had the specific allegations been plead earlier. Indeed their subsequent allegations were largely a reiteration of the one's [sic] plead here and rise or fall for the same factual or legal reasons."[41] In an "abundance of caution," however, the arbitrator excluded the last dated letter from Daniel Cadle because "it was too late for Respondent Shaulis to have time to address its contents."[42] The record indicates that the arbitrator applied the relevant standard.[43]

Additionally, Defendants argue that the arbitrator misapplied the Tennessee anti-SLAPP statute. Again, however, even an erroneous interpretation or application of law by the arbitrator is not reversible,[44] and Defendants have not made the required showing that the arbitrator disregarded the relevant law. The statute in question provides:

> (a) Any person who in furtherance of such person's right of free speech or petition under the Tennessee or United States Constitution in con-

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[40] *Ellis*, 609 F.2d at 439. Defendants also cited to *Lomartira v. American Auto Ins. Co.*, 371 F.2d 550 (2nd Cir. 1967) for the same proposition.

[41] Doc. No. 195-5 at 3.

[42] *Id.*

[43] Moreover, as discussed below, arbitration proceedings are "not constrained by formal rules of procedure or evidence." *Checkrite of San Jose, Inc. v. Checkrite Ltd.*, 640 F. Supp. 234, 236 (D. Colo. 1986).

[44] *AIRW*, 45 F.3d at 1463.

> nection with a public or governmental issue communicates information regarding another person or entity to any agency of the federal, state or local government regarding a matter of concern to that agency shall be immune from civil liability on claims based upon the communication to the agency.
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> (b) The immunity conferred by this section shall not attach if the person communicating such information:
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> (1) Knew the information to be false;
>
> (2) Communicated information in reckless disregard of its falsity; or
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> (3) Acted negligently in failing to ascertain the falsity of the information if such information pertains to a person or entity other than a public figure.[45]

In pertinent part, Judge Dubofsky's award states:

> Here, I find that the respondents knew that their statements were false. Cadle testified that he was aware of Harkless' notes in which Choppin indicated that he had obtained approval from his superiors regarding the loan and that Hicks was not liable. Cadle also testified that he did not believe that Hicks committed bank fraud, yet he continued to make such allegations. Before the bank fraud allegations were lodged, Cadle and the other respondents were also aware of BOA's counsel's letter stating that Hicks was not liable on the note. Moreover, respondents continued to

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[45] Tenn. Code Ann. § 4-21-1003.

> lodge such allegations after BOA acknowledged that it was not the victim of bank fraud.[46]

The arbitrator further found that "[d]espite extraordinary resources available to him, Shaulis acknowledged that he never determined what the elements of bank fraud were. He did not thoroughly review the BOA/Buckeye file where he would have seen information exonerating Hicks. The views of the apparent victim (BOA) were given no weight."[47] Daniel Cadle submits that the First Circuit's holding in *United States v. Kenrick*[48] that the "intent" element of bank fraud means an intent to defraud, not an intent to injure, somehow establishes that Defendants had a reasonable basis for reporting that Plaintiff had engaged in bank fraud, and means that Judge Dubofsky applied the wrong legal standard. To the contrary, Judge Dubofsky stated the proper "intent to defraud" standard,[49] found that there was no such intent in this case, and further found that Defendants were fully aware of Plaintiff's lack of liability on the Note.[50] Judge Dubofsky thus expressly concluded that the immunity provided by Tenn. Code Ann. § 421-1003(a) did not apply.[51] There has been no

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[46] Doc. No. 162-3 at 16-17.

[47] *Id.* at 30.

[48] 221 F.3d 19 (1st Cir. 2000).

[49] *See* Doc. No. 162-3 at 10, citing 9 U.S.C. § 1344.

[50] Judge Dubofsky also stated that "I find that there has been no perjury . . . It is apparent from the previously referenced facts and circumstances that neither bank fraud nor perjury occurred and that respondents never had a reasonable objective or subjective belief that it did." Doc. No. 162-23 at 13.

[51] *See* Doc. No. 162-3 at 29-30. The court further finds that the arbitrator did not manifestly disregard the law by holding all four Defendants liable for tortious conduct in this case.

showing that he manifestly disregarded the law in so doing.

Defendants also argue that Judge Dubofsky manifestly disregarded the law by awarding more than $2 against Shaulis, since Plaintiff's post-arbitration brief asked for only $2 against Shaulis. Defendants are correct that under Tennessee law, a plaintiff cannot recover damages in excess of the damages amount pleaded in the complaint.[52] However, this is a procedural rule, and "matters of procedure lie within the discretion of the arbitrators," who are not bound by formal rules of procedure.[53] Regardless, Plaintiff's Amended Complaint, filed in this Court pursuant to this Court's procedural rules, did not and was not required to request a certain dollar amount in damages.[54] Similarly, Defendants contend that the arbitrator manifestly disregarded Tennessee law and exceeded his jurisdiction by awarding punitive damages when punitive damages were not pleaded in the Amended Complaint. However, even if the arbitrator had been bound by Tennessee procedural rules of pleading, and he was not, punitive damages need not be specially pleaded under Tennessee law, and "need not be claimed in so many words where the conduct would amount to willful and malicious con-

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[52] *See Newcomb v. Kohler Co.*, 222 S.W.3d 368, 384 (Tenn. App. 2006).

[53] *See Checkrite*, 640 F. Supp. at 236.

[54] *See* Fed. R. Civ. P. 8(a). The arbitrator stated that while he understood the generosity leading to Plaintiff's request to limit damages against Shaulis, "I do not believe my award should be unilaterally determined by either party, if the parties jointly or collectively stipulate and agree to vacate my award and enter a $1 award, I will likely do so." Doc. No. 162-3 at 25 n.15.

duct,"[65] as was the case here. Defendants' arguments fail.

The arbitrator concluded that Hicks' statements to the Bank that he was not liable on the Note, at a time when he did not know of any agreement between the Bank and the Defendants, could not support Defendants' counterclaim of tortious interference with contractual relations. Although Defendants have resubmitted portions of Shaulis' testimony in which Shaulis speculates about the Bank's reactions to Plaintiff's communications, they have not shown that the arbitrator manifestly disregarded the law applicable to this counterclaim.

Defendants are correct that, under Tennessee law, a plaintiff alleging intentional interference with emotional distress/outrageous conduct must prove that the defendant's conduct caused him or her "serious mental injury."[66] Defendants contend that Plaintiff suffered no such injury in this case. The arbitrator disagreed, finding that, as a result of Defendants' actions, Plaintiff "fears for his family, his own well-being and his personal safety."[67] The arbitrator wrote that "[Plaintiff] suffers from a significant loss of sleep."[68] "[Plaintiff] has described an extremely distressful, painful and protracted psychological response to Cadle's incessant efforts to have him criminally indicted and otherwise financially destroyed."[69]

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[65] *See Security Bank and Trust Co. v. Nelms*, 1986 WL 7813, *5 (Tenn. Ct. App. July 14, 1986) (unpublished).

[66] *See Newsom v. Textron Aerostructures*, 924 S.W. 2d 87, 98 (Tenn. App. 1995).

[67] Doc. No. 162-3 at 14.

[68] *Id.*

[69] *Id.*

"Respondents have brought his wife and parents into this litigation."[60] "Many people would have collapsed from these unrelenting attacks and pressure."[61] The arbitrator noted that "[Plaintiff] and his wife have delayed starting a family until some level of finality is brought to this proceeding. In addition to fear, worry and loss of sleep, [Plaintiff] testified to his diminished appetite and stress-caused gastrointestinal problems. I find that he has suffered from all of these."[62] The evidence in arbitration unequivocally indicated that Plaintiff has suffered "serious mental injury," and Defendants have failed to establish any manifest error in Judge Dubofsky's findings.

Citing to *Shockley v. Crosby*,[63] Defendants submit that under Tennessee law, stress symptoms for which Plaintiff never sought medical treatment are "not actionable."[64] *Shockley* does not, however, enunciate such a rule. Rather, the *Shockley* court considered the plaintiff's failure to seek medical treatment as but one of several factors relevant to his outrageous conduct claim. The court also noted that there was no evidence that plaintiff had lost sleep or time from work, and that there was no testimony from the plaintiff himself regarding the incident's effect on him.[65] The court made clear that

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[60] *Id.*

[61] *Id.*

[62] *Id.* at 15.

[63] 2004 WL 2113052 (Tenn. Ct. App. Sept. 21, 2004) (unpublished).

[64] *See* Doc. No. 199 at 21.

[65] *Shockley*, 2004 WL 2113052 at *8.

> [proof of intentional infliction of emotional distress] may include a claimant's own testimony, [cite] as well as the testimony of other lay witnesses acquainted with the claimant, [cite]. Physical manifestations of emotional distress may also serve as proof of serious mental injury. Moreover, evidence that a plaintiff has suffered from nightmares, insomnia, and depression or has sought psychiatric treatment may support a claim of a serious mental injury.[66]

Defendants are incorrect that a plaintiff must have sought medical treatment in order to recover on a claim for intentional infliction of emotional distress. The arbitrator did not manifestly disregard the applicable law on this claim.

Finally, Defendants contend that the arbitrator manifestly disregarded the law by awarding prejudgment interest.[67] State law applies to the question of the propriety of prejudgment interest on state law claims.[68] Under Tennessee law, prejudgment interest cannot be awarded in personal Injury cases. The court in *Francois v. Willis*[69] made this rule clear:

> One of the legal principles firmly embedded in our jurisprudence is that prejudgment interest is not available in personal injury cases. [Fn. omitted]. The Tennessee Supreme Court first

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[66] *Id.* (internal citations omitted) (quoting *Miller v. Willbanks*, 8 S.W. 3d 607, 611-12 (Tenn 1999)).

[67] *See* Doc. No. 162-4.

[68] *See United Phosphorus, Ltd. v. Midland Fumigant, Inc.*, 205 F.3d 1219, 1236 (10th Cir. 2000). Thus, it appears that prejudgment interest is not properly characterized as a "procedural" matter which would be subject to the arbitrator's discretion.

[69] 205 S.W. 3d 915 (Tenn. App. 2006).

> recognized this principle in *Louisville & Nashville R.R. v. Wallace*, 91 Tenn. 35, 43, 17 S.W. 882, 884 (1891), and this court has recently reiterated it in no uncertain terms. *Hollis v. Doerflinger*, 137 S.W.3d at 60. [Fn. omitted]. Thus, when faced with a motion for pre-judgment interest in a personal injury case, the trial court must take this legal principle into account and, therefore, must deny the motion because to do otherwise would be to apply an incorrect legal standard.[10]

Plaintiff does not dispute that this is a personal injury action, agrees that Tennessee law applies to the issue of prejudgment interest, and acknowledges that Judge Dubofsky was provided with all of the relevant case law.[11] The written Final Award itself does not set forth any authority or reasoning supporting the prejudgment interest award,[12] and the Court otherwise has not located in the record any indication of why Judge Dubofsky apparently rejected or ignored the controlling Tennessee case law on this issue. Plaintiff, for his part, has not come forward with any case law calling into question the clear holding of *Francois*. It does appear from the record that the arbitrator manifestly disregarded clear, controlling law mandating that prejudgment interest is not available to Plaintiff in this action. Therefore, that portion of the Final Award which awards prejudgment interest to Plaintiff will be vacated.

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[10] *Id.* at 916.

[11] *See* Doc. No. 195 at 15-16.

[12] *See* Doc. No. 162-4 at 1.

Accordingly, for the reasons set forth above, it is

ORDERED that (1) Plaintiff's Motion To Confirm Phase II Arbitration Award And To Enter Judgment For Phase I And II Awards (Doc. No. 162), (2) Defendant Daniel C. Cadle's Motion To Vacate Phase II Arbitration Award (Doc. No. 197), and (3) the Motion To Vacate Arbitration Award filed by Defendants The Cadle Company, Buckeye Retirement Co., LLC. Ltd., and William E. Shaulis (Doc. No. 199) are granted in part and denied in part. It is

FURTHER ORDERED that portion of Judge Frank N. Dubrofsky's Final Award (consisting of the May 14, 2007, Order, the May 14, 2007 and Ruling On Affirmative Defenses, and the June 18, 2007, Final Award) which awards prejudgment interest on compensatory damages to Plaintiff is vacated. It is

FURTHER ORDERED that Judge Frank N. Dubofsky's Final Award (consisting of the May 14, 2007, Order, the May 14, 2007 and Ruling On Affirmative Defenses, and the June 18, 2007, Final Award) otherwise is confirmed in all aspects. It is

FURTHER ORDERED that Plaintiff's Renewed Motion To Expedite Ruling In Connection With Motion To Confirm (Doc. No. 245) is granted. It is

FURTHER ORDERED that the parties shall file a joint status report on or before August 22, 2008, addressing the status of the arbitration of the claims in Plaintiff's Supplemental Complaint.

DATED at Denver, Colorado, this 23rd day of July, 2008.

BY THE COURT:

/s/ Zita L. Weinshienk
ZITA L. WEINSHIENK, Senior Judge
United States District Court

APPENDIX C

In the Arbitration of:

KERRY R. HICKS,
Claimant

v.

Bank of America, N.A.; The Cadle Company; Buckeye Retirement Co., LLC; Daniel C. Cadle and William E. Shaulis,
Respondents.

ORDER

This matter is before me in connection with the trial of the Phase II claims, which was held October 10-12, 2006. On January 15, 2007, I granted claimant's Motion to Amend to Conform to the Evidence. The amendment permits me to address and resolve the issues before me concerning a continuous course of conduct that falls within the scope of the pending claims, with the exception of the last bank fraud complaint filed by Respondent Daniel C. Cadle ("Cadle").[1]

[1] Belatedly, Cadle has complained of a delay in the arbitration process. There are several reasons why the arbitration has been somewhat prolonged. Almost all of the delay resulted from the process agreed to by the parties. For example, the respondents wanted to postpone the trial until January 2007. The parties agreed to written closing and rebuttal arguments. After Cadle decided to proceed pro se, he filed a spate of motions and complaints. Several required lengthy briefing schedules. Cadle indicated at one point that he wanted the arbitration process to continue for ten years.

The claimant Kerry R. Hicks ("Hicks") brings claims for defamation, outrageous conduct and abuse of process in connection with the actions of certain respondents in lodging criminal allegations with various governmental authorities and others concerning alleged bank fraud and/or perjury. The respondents, or certain of them, bring counterclaims against the claimant for abuse of process, tortious interference with contractual relations and intentional interference with business relations.

JURISDICTION

On January 15, 2007, I entered an order confirming that I have jurisdiction over all pending claims. Respondents' recent attempt to contest jurisdiction in their closing brief is rejected. Prior related orders on this issue were entered in the U.S. District Court for the District of Colorado and by former arbiter James Hinga (deceased).

GENERAL FINDINGS OF FACT AND RELATED DISCUSSION

In December 1999, Kerry R. Hicks ("Hicks") was the CEO of Specialty Care Network, Inc. ("SCN"), a publicly-traded company in the physician practice management ("PPM") industry. At that time, the PPM industry was struggling and the primary asset owned by SCN with the potential to produce future revenue was a small healthcare rating company. Pursuant to agreements with the minority interest holders in the ratings company, SCN had until December 31, 1999, to buy out the minority shareholders or the health care rating system asset would be under the control of those shareholders.

Walter Choppin ("Choppin"), a senior vice president of Bank of America ("BOA") initially suggested

that Hicks borrow the $4 million personally from BOA to buy out the minority interest in the rating company. Hicks rejected that idea. Choppin then suggested that the SCN executives borrow $3.55 million from BOA under an agreement through which Hicks would be liable for $2 million; Patrick Jaeckle ("Jaeckle"), $1 million; Paul Davis, $100,000; David Hicks, $100,000; and $350,000, which SCN would pay back, but Hicks and Jaeckle would be responsible for the repayment if SCN did not. Even though the face of the promissory note was a joint and several note to be signed by Hicks and Jaeckle, BOA through Choppin agreed that the liability was limited as set forth above (Hicks owed $2 million plus up to $350,000 if SCN defaulted).

There appear to be several reasons why BOA through Choppin made this oral commitment to Hicks. Hicks was unwilling to assume responsibility for Jaeckle's $1 million loan, but BOA had other significant financial reasons (*i.e.*, a $45 million outstanding loan with SCN) to work with Hicks. Further, Jaeckle apparently offered adequate security to cover the $1 million and therefore his payment appeared quite likely. BOA failed to timely tap into Jaeckle's security assets, and their value quickly depreciated or was otherwise lost.

The loan was set forth in a Promissory Note signed by Hicks and Jaeckle, which incorporated the Loan Documents that underlie the transaction. The Loan Documents included Loan Subordination Agreements ("LSA's") that evidenced the money the executives loaned to SCN—Hicks, $2 million; Jaeckle, $1 million; Davis, $100,000; D. Hicks, $100,000; and Hicks and Jaeckle (as guarantors for SCN), $350,000. BOA wanted to be sure that the debt of SCN to the

individuals would be subordinated to SCN's debt to BOA. Further, the LSA's expressly referenced "certain other conditions not necessary to be recited at length herein. . . ." Claimant argues that those other conditions include the above-referenced limits on liability that Choppin repeatedly assured Hicks and the other borrowers existed.

It is unclear if Hicks is arguing that the LSA created an ambiguity in the terms of the note or modified the note to include the oral agreement. This case is primarily about alleged fraud, abuse of process, and outrageous conduct, and not so much about the strict civil enforceability of the note in light of the oral agreement and the LSA.

In early January 2000, Hicks paid his entire $2 million obligation to BOA. Jaeckle and Hicks renewed the promissory note for $1.35 million with BOA, and Choppin again assured Hicks and Davis that Hicks had no liability, would only be responsible as a guarantor for SCN's $350,000 debt as per the previous terms, and that Jaeckle would be obligated for the $1 million. Davis took notes evidencing this conversation with Choppin, expressly providing "will carve out Kerry's exposure to be only $350K." Furthermore, when Hicks paid off the $2 million, Choppin again assured him that he had no further liability, and that his signature on the future notes was simply needed as an accommodation. With similar assurances after SCN paid off its $350,000 obligation, the promissory note was renewed in June 2000.

Respondent Daniel C. Cadle is effectively the principal figure in all of his numerous companies, including Respondents Buckeye Retirement Co., LLC, LTD ("Buckeye") and The Cadle Company. Cadle at all times here acted as an agent of these

companies. Respondent William E. Shaulis is an officer and manager of Buckeye and The Cadle Company, and at all relevant times was an agent of these companies.[2] Cadle has created numerous legal entities to carry out his large debt collection enterprises, and he is the central figure in running these companies. Buckeye and The Cadle Company are liable under respondeat superior and alter ego theories.

A major aspect of this multi-company business is to bid to buy commercial paper from businesses such as BOA. Cadle's companies engage in competitive bidding against other collection companies. Usually, the company with the highest bid buys the right to enforce the lender interest in the contract against the borrower. To be successful in this process, Cadle's companies must be experienced, savvy and fortunate. Cadle companies handle 1500 to 2000 cases at a time.

Cadle is sophisticated, forceful and aggressive. He has a long history in the collection business and is knowledgeable about it. There are approximately 100 people who work for him and his various companies. Cadle and his companies employ several in-house attorneys plus numerous other attorneys around the country.

While Cadle did not sign the original or follow-up letters to the Colorado or Tennessee attorney generals, he had a major and determinative role in creating and sending these letters. Shaulis works in the same office building as Cadle. Cadle is Shaulis' boss and when necessary, Cadle can and does control Shaulis' work and activities. Shaulis brought the

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[2] While Shaulis is a "Respondent," his liability extends only to those matters in which he participated.

attorney general letters to Cadle for review, discussion and editing. The letters were typed by Cadle's secretary.

These facts, coupled with Cadle's and Shaulis' other testimony, actions and demeanor makes it obvious that Cadle authorized and approved these initial letters, as well as the subsequent ones signed by Shaulis. Cadle's control over this matter is also demonstrated by his subsequent take-over of the ongoing efforts of Respondents to persecute Hicks and get him indicted. At a minimum, these attorney general letters reflect a joint tortfeasor effort; more likely, they resulted from Cadle's direction, control and approval.

The subsequent words and actions of BOA confirming Hicks' statements that he was not liable reflect a correct understanding of the situation and not, as respondents claim, BOA being risk-adverse. While BOA might have tried an end-run around its oral promise to Hicks, that would have been inequitable and wrong.

Long after Hicks paid off his obligation, the respondents purchased the Promissory Note from BOA. Despite a notation in the file that Hicks was not liable, The Cadle Company tried to collect from Hicks. Hicks then maintained that he was not liable. On July 24, 2003, counsel for BOA wrote to Denise Harkless ("Harkless") of The Cadle Company advising her of the following: "By the time the loan was sold to The Cadle Company, BOA had concluded that Hicks was not obligated under the Promissory Note . . . ." Stowe Query of BOA confirmed that Hicks was not liable because of the oral agreement or oral representations that had been made to him by Choppin, which were referenced in BOA's loan file. More-

over, Harkless learned by phone that Choppin essentially confirmed Hicks' story and that Hicks was not liable.

On the eve of the first arbitration hearing, September 27, 2004, respondents sent letters to the attorneys general for the states of Tennessee and Colorado accusing Hicks of engaging in bank fraud. Cadle was involved in writing and editing the letter and in asserting that Hicks was involved in bank fraud.[3] Unwilling to let the matter rest there, respondents have engaged in a relentless campaign to defame, intimidate and harass Hicks by raising alleged bank fraud, perjury and other serious allegations against Hicks before numerous other governmental and private bodies.[4] The foregoing communications are

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[3] Arbiter Hinga's award confirmed that respondents Buckeye Retirement and The Cadle Company were alter egos of each other and liable for the acts of each others. That finding was affirmed by the 10th Circuit Court of Appeals and I reach the same conclusion based upon the evidence. Additionally, Shaulis and Cadle may be held individually liable for any tortious acts committed by them, despite their contention that such actions were taken in a representative capacity. *See Jurgensmeyer v. Prater*, 2003 WL 1923826 at *6, 10 (Tenn. App. April 24, 2003). Each of Cadle's acts was tortious.

[4] Letter dated September 27, 2004, from Shaulis to the Tennessee and Colorado attorneys general; letter dated November 8, 2004, from Shaulis to the Tennessee Department of Financial Institutions; letter dated April 29, 2005, from Shaulis to Nancy Bullis at the Colorado Attorney General's Office; letter dated June 22, 2005, from Shaulis to Colorado Attorney General; letter dated June 24, 2005, from Shaulis to Colorado Attorney General and copied to Lori Ausburn of the Special Prosecutions Unit; letter dated June 24, 2005, from Cade to JAMS; letter dated June 24, 2005, from Cadle to Colorado Supreme Court; letter dated July 15, 2005, from Shaulis to Colorado Attorney General and copied to Lori Ausburn of the Special Prosecutions Unit; letter dated June 24, 2005, from Cade to Arbiter Hinga,

part of an effort by Cadle to retaliate against Hicks for respondents' loss of a business relationship with BOA (which respondents caused), for contesting Cadle's position, for trying to force Hicks to compromise his civil claims in order to avoid criminal prosecution,[5] and to intimidate others involved in the process.

These numerous, repeated filings evidence a willful and malicious course of conduct that is not justified by a citizen's obligation to report, in good faith, suspected criminal activity. Cadle's filings all confirm a premeditated and willful intent to harm Hicks.

Right before this trial, Cadle discharged the law firm of Pearson, Horowitz and Burnett and his attorneys Will and Russell Rowe from representing him. I granted his request to proceed pro se since Colorado case law indicates that a person has a constitutional right in a civil case to proceed pro se and because the JAMS rules allow it. Further, Cadle is sophisticated about legal matters. The other respondents remained represented and to the extent that their arguments and objections overlapped with Cadle's position, he

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Hicks and Kostolansky; September 2005 telephone calls from Cadle to Jay Restel of the Federal Reserve Board; October 29, 2005, telephone call from Shaulis to Nancy Bullis; January or February 2006 telephone call from Cadle to the Office of the Comptroller of the Currency; letter dated January 17, 2006, from Cadle to the Associate General Counsel for the Board of Governors for the Federal Reserve System; letter dated February 13, 2006, from Cadle to HealthGrades' Board of Directors; letter dated July 26, 2006, from Cadle to the SEC. Cadle indicates that none of the numerous law enforcement officials has shown any interest in the case.

[5] In fact, before the September 27, 2004 letter was sent to the attorneys general, certain of the respondents submitted a draft to counsel for Hicks.

received legal help. Cadle used his new pro se status to attempt to intimidate Hicks, Hicks' counsel and JAMS.

Cadle and his numerous companies have made hundreds of millions of dollars in the collection business. Despite this lawsuit and his difficulties with BOA, he and his companies have been increasingly prosperous over the past several years.

Cadle attacked the former arbiter James Hinga, now deceased, for his prior ruling by filing a request for investigation with Colorado's attorney regulation counsel. Cadle referred to arbiter Hinga as being incompetent and/or corrupt. Cadle tried to impact Hinga's subsequent decisions by protesting his decision with JAMS in California. Cadle acknowledged that he stated that Hinga should "rot in hell" and then indicated he was surprised that Hinga's death met his wish so quickly.[6]

Cadle has also explicitly and/or implicitly threatened JAMS with criminal prosecution. Cade has contempt for the arbitration and federal court systems of

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[6] At the court hearing in October 2006, Cadle referenced Hinga by claiming that a federal magistrate had blamed Hick's attorney, Kris Kostolansky ("Kostolansky"), for Hinga's unexpected and early demise. Cadle's on-going psychological assaults and accusations against Kostolansky have been extraordinary. Cadle filed two requests for investigation of Kostolansky with the attorney regulation counsel. Cade repeatedly accused Kostolansky of tortious and criminal misconduct, including subordinating perjury and other terrible misdeeds. Cadle repeatedly threatened to sue Kostolansky and other members of his law firm, including young associates. Cadle's interactive hostility, anger and disdain directed to Kostolansky is disturbing. Kostolansky has continued with this case despite these extraordinary circumstances, and he is to be commended for his professionalism.

Colorado. His threats were intended to be retaliatory, intimidating and destructive.

What difference does it make to Hicks that these other people or entitles are under attack? For parties to have confidence in judges or arbiters they cannot be subjected to ongoing, retaliatory attacks. Moreover, I find that these attacks by Cadle are intended to intimidate Hicks from pursuing his claim and to retaliate against him for doing so.

At one point in this process, I asked Cadle why he bought stock in Health Grades. Cadle indicated that his purchase was not an investment but rather provided an opportunity to spy on Hicks and to keep track of his business situation. Cadle has retaliated against Hicks by using his stockholder position to harrass and intimidate him.

Further evidence that confirms Cadle's malice, recklessness and lack of good faith includes the following: (1) his promise to continue to report Hicks to authorities no matter the outcome of this arbitration; (2) his threats to report BOA attorneys and officers for not reporting bank fraud; (3) his personal attacks on the late arbiter, James Hinga, calling him crooked or incompetent, and accusing him of malfeasance and extortion; (5) the filing of requests for investigation by attorney regulation counsel against Hinga and Kostolansky; (6) and his repeated statements, both under oath at deposition and before me, that he desires the late arbiter to "rot in hell," that he wants Hicks to "rot in hell," and his desire that Hicks' counsel "burn in hell."

It is also noteworthy that on April 4, 2005, Hinga found that BOA's letter of June 24, 2003, stated that "Hicks was not responsible" for the alleged debt.

BOA's counsel's admission at the first trial also exonerated Hicks from allegations of fraud against the bank. Further, any obligation that these respondents might have had to report bank fraud was negated by Hinga's finding. Nevertheless, respondents have continued to make such filings to harass, intimidate and make life miserable for Hicks.[7]

I find that there was no bank fraud in this case. Bank fraud concerns the knowing execution or attempted execution of a scheme or artifice to obtain money or other consideration from a financial institution with intent to defraud: 18 U.S.C. § 1344. That did not happen here.

The evidence establishes that the entire loan transaction, including the oral agreement that Hicks' liability would be limited to $2 million, was fully disclosed to BOA. The LSA's referenced "certain other conditions," and BOA has confirmed that Hicks is "not obligated" on the Note. There is no evidence that the claimant intended to defraud BOA. Hicks fully disclosed the extent of his liability, and BOA through Choppin accepted those conditions.

Further, there was no scheme to defraud. BOA agreed to the limitations on Hicks' liability. BOA has acknowledged that it was not a victim of bank fraud.

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[7] When pressed, Cadle testified that he did not know or care whether Hicks committed bank fraud, but that he will nonetheless continue his crusade against Hicks. Cadle has also testified that Hicks committed perjury and not bank fraud. Despite acknowledging that Hicks did not commit bank fraud, Cadle continued to allege that he did.

DISCUSSION OF TRUTH AS A DEFENSE TO THE DEFAMATION CLAIM

Respondents have asserted truth as a defense to the defamation claim. This requires respondents to establish that bank fraud, by a preponderance of the evidence, occurred.[8] They have failed to do this.

In regard to the fraud issue, I make the following determinations:

(1) There was an oral agreement between Choppin and Hicks that Hicks was only obligated for $2 million of the $3 million that he and Jaeckle borrowed.

(2) Choppin was a senior vice president at BOA and had worked there for many years. He told Hicks that Hicks was only liable for $2 million (plus up to $350,000 if SLN defaulted), and Hicks relied on this representation. While it is not certain that Choppin formally cleared this oral agreement with higher bank officials, he conveyed the impression that he had done so to Hicks.

(3) In addition to Hicks' and Choppin's testimony on this point, there is compelling testimony and other evidence that confirms a lack of fraud and the existence of an oral agreement, *i.e.*, the statements, testimony and written notes of other signators to the agreement; the action or inaction of BOA in not enforcing the contract against Hicks when Jaeckle did not pay up; the actions of officers; the notes in the loan file indicating that Hicks was not liable; BOA's counsel's letter stating that Hicks was not liable; conversations between Harkless and Choppin indicating that Hicks was not liable and that there was

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[8] As referenced earlier, Cadle has testified that he now believes Hicks committed perjury, not bank fraud.

an oral contract; BOA buying the note back; BOA interrupting its relationship with respondents; the LSA agreement concerning other understandings; and other evidence cited elsewhere in this opinion and incorporated by evidence.

(4) Respondents argue that the statute of frauds makes any oral agreement void and therefore not binding on them or BOA. This argument has little, if any, significance in determining the fraud issue. Choppin's oral agreement not to "hold" Hicks liable on Jaeckle's $1 million obligation reflects an accomodation, agreement and understanding. In other words, because of the statute of frauds, arguably BOA could try to enforce the written contract that it had promised not to. When it put the file up for sale, there was information in it indicating that Hicks was not liable or obligated. BOA contracted with respondents to be able to buy back the note.[9] If, as here, the victim (BOA), with knowledge, agrees to the alleged fraudulent act, there is no deception or fraud. Therefore, even if the statute of frauds bars enforcement of the oral understanding, Hicks did not engage in fraud.

In his letter January 17, 2006 letter, Cadle contends that Hicks committed perjury. Further, during the February 8, 2007 status conference, Cadle contended that "there's 100 other false statements that

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[9] Respondents probably bought this paper at a greatly discounted price because the file indicated that Hicks was not liable for Jaeckle's $1 million. Respondents then chose to disregard substantial information confirming the fact that Hicks had an agreement that he was not liable on Jaeckle's $1 million loan. Respondents were then forced by BOA to sell back the note. Despite a contractual obligation to sell the note back to BOA, respondents resisted and delayed in doing so.

he has made. . . ." Given my ruling regarding the lack of bank fraud, and my opportunity to observe Hicks' demeanor and review the substance of his testimony, I find that there has been no perjury. Like the bank fraud claim, the perjury claim is without merit and used to retaliate and intimidate Hicks and his counsel. It is apparent from the previously referenced facts and circumstances that neither bank fraud nor perjury occurred and that respondents never had a reasonable objective or subjective belief that it did.

FURTHER FINDINGS REGARDING CADLE'S ACTS AND GENERAL DISCUSSION OF DAMAGES, LOSSES AND INJURIES

The actions of these respondents have caused Hicks severe emotional distress. Aside from lodging criminal felony allegations against Hicks, respondents (except Shaulis) have attacked individuals or entities that might side with or support him, e.g. (1) two failed requests for investigation by attorney regulation counsel against Hicks' counsel, including allegations of attempted extortion; (2) a failed request for investigation by attorney regulation counsel against arbiter Hinga; (3) the posting of a subpoena near Hicks' community mailbox alluding to the criminal allegations; and (4) making claims against Hicks' employer alleging bank fraud, a conspiratorial criminal coverup that involved the late arbiter Hinga, and seeking $10.3 million from Hicks' employer. The actions of respondents have been designed to ruin Hicks' personal, family and business life. These actions have had a continuing debilitating impact on him.

Hicks fears for his family, his own well-being and his personal safety. Respondent's actions have caused Hicks to be worried about the negative impact of all

this on his employer and Health Grades' customers and investors.

The evidence indicates that Hicks suffers from a significant loss of sleep and is constantly fatigued. He often has cold sweats and nightmares. The quantity and quality of his sleep has been substantially diminished. Every night he worries about what these respondents have done and may do next. He is fearful of the actions that they may take against him, his company and his family.

Respondents argue that Hicks did not have a sufficient psychological reaction to justify an award of damages. I disagree. Hicks has described an extremely distressful, painful and protracted psychological response to Cadle's incessant efforts to have him criminally indicted and otherwise financially destroyed. Hicks has suffered sleeplessness and extreme anxiety, worry and fear due to his concern about Cadle's actions. Respondents have brought his wife and parents into this litigation. Hicks has a legitimate fear that Cadle will not stop his efforts until Hicks is destroyed financially, psychologically and personally. Many people would have collapsed from these unrelenting and destructive attacks and pressure. Hicks' concern about the seriousness of this matter is reflected in his hiring a criminal attorney to deal with Cadle's accusations.

Hicks testified that he and his wife have delayed starting a family until some level of finality is brought to this proceeding. In addition to fear, worry and loss of sleep, Hicks testified to his diminished appetite and stress-caused gastrointestinal problems. I find that he has suffered from all of these.

As part of their defense, respondents claim that they reasonably investigated the bank fraud issue. I disagree. The problems with respondents' investigation are (1) with ready access to inhouse attorneys and numerous outside counsel, no legal opinion about the existence of bank fraud was sought, obtained or used by Cadle or Shaulis; (2) the concept that a bank is *defrauded* when a senior vice president tells a borrower that despite the wording of a promissory note, the bank will forgo enforcing certain aspects of the note against the borrower is illogical; if the agreement existed, as respondents stated, there is no fraud; the failure to better investigate and analyze these facts reflects the respondents' unwillingness to get to the bottom of this and acknowledge the retaliatory and intimidating purpose of their communications; (3) ironically, despite engineering or creating numerous allegations of bank fraud, Cadle acknowledged that Hicks was not guilty of bank fraud and then continued to file subsequent bank fraud allegations; (4) Shaulis has acknowledged that he did not carefully review the notes in the BOA file prior to writing to the attorney generals; and (5) despite the wording of the LSA suggesting that the note may be subject to agreements not written in the note, no legal or factual research was done on this issue.

In evaluating this particular claim, respondents needed to thoroughly investigate the facts and the law, including determination of the meaning of the elements of bank fraud, particularly the concept of *intent* to defraud or false pretenses.

CONCLUSIONS OF LAW

Defamation

Defamation occurs when the defendant publishes a statement about another with knowledge of its falsity, or with reckless disregard for the truth, and such statement is defamatory. *Sullivan v. Baptist Memorial Hospital*, 995 S.W.2d 569, 571 (Tenn. App. 1999).

The letters written by respondents to the attorneys general of Colorado and Tennessee, along with the other letters written to various governmental authorities and other entities raising bank fraud and perjury allegations against Hicks, are published statements that, as I have found, are false and defamatory to Hicks. *See Taylor v. Nashville Banner Pub. Co.*, 573 S.W.2d 476, 481 (Tenn. App. 1978) (The "primary argument is that the article charges him with a crime, which of course would make it clearly defamatory.") Any contention that the respondents were expressing an opinion and therefore are not liable is rejected because the opinion expressed may be reasonably understood to imply undisclosed defamatory facts justifying the opinion. *Revis v. McClean*, 31 S.W.3d 250, 253 (Tenn. App. 2000).

Here, I find that the respondents knew that their statements were false. Cadle testified that he was aware of Harkless' notes in which Choppin indicated that he had obtained approval from his superiors regarding the loan and that Hicks was not liable. Cadle also testified that he did not believe that Hicks committed bank fraud, yet he continued to make such allegations. Before the bank fraud allegations were lodged, Cadle and the other respondents were also aware of BOA's counsel's letter stating that Hicks

was not liable on the note. Moreover, respondents continued to lodge such allegations after BOA acknowledged that it was not the victim of bank fraud.

Claimant Hicks has neither claimed nor proved a loss of income. While Hicks has claimed and demonstrated significant psychological harm, he has been able to work as Health Guides CEO. I find that there has been no proof of past or present lost wages or income.

With regard to the perjury allegations, Hicks' testimony was corroborated by that of Jaeckle, Davis, D. Hicks, and the notes Harkless took of her converstion with Choppin, as well as BOA's confirmation that Hicks was not liable and BOA was not the victim of bank fraud. Further, since I found that no bank fraud was committed, any statements of Hicks contending that he did not commit bank fraud are not perjury. Because Hicks did not commit bank fraud, and since I found that none of his statements constitute perjury, the contention of the corporate respondents and Cadle that Hicks committed the crime of perjury are also defamatory.[10]

Damages for defamation include "impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering." *Ezell v. Graves*, 807 S.W.2d 700, 702 (Tenn. App. 1990). In this case, the substantial injuries suffered by Hicks have been set forth above. I hereby determine that Hicks' damages for personal humiliation, mental anguish and suffering, loss of reputation and standing in the community from these defamations is

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[10] If the claimed perjury is the lack of an oral agreement between Coppin, Hicks and BOA, this position is contrary to the evidence in the case and respondents' admissions.

$750,000 against Cadle and the corporate respondents.[11] My award against Shaulis is $200,000 because his defamatory and hostile acts stopped, and the harm is less.

Outrageous conduct

The attorney general bank fraud allegations were helpful in discerning respondents' true intent in bypassing the arbitration process. Further, the subsequent discovery and statements of respondents demonstrate that their actions in making criminal allegations were wanton and willful. While I am troubled by the contention that outrageous conduct is *not* ipso facto wanton and willful in light of my above-stated resolution of the matter, the contention is irrelevant.[12]

Here, the totality of the statements and actions of respondents constitute conduct that goes beyond all bounds of decency and is considered atrocious and intolerable in a civilized community. I have never seen a party to a lawsuit engage in such relentless, protracted and destructive conduct to harm another individual. Here, despite the knowledge that there was no bank fraud, Cadle has shown no remorse for the criminal allegations of bank fraud, and he intends to continue making such allegations even after

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[11] These damages are readily inferable from the profound and per se nature of the accusations here. A lack of income loss does not necessarily mean that there has been no loss of reputation or standing in the community.

[12] Arbiter Hinga determined that the initial filing of bank fraud allegations was outrageous, yet not wanton and willful for purposes of punitive damages. Hinga's earlier award in this case was based on certain respondents violating the arbitration provision in the promissory note and not for filing the bank fraud allegations.

the conclusions of this arbitration. There is no civic-minded or morally-obligated reporting here.

Cadle's outrageous conduct includes: (1) notifying numerous governmental entitles of Hicks' conduct; (2) threatening to go to the newspapers; (3) posting a humiliating subpoena near Hicks' community mailbox; (4) referencing alleged criminal conduct of the former arbiter and Hicks' counsel when seeking their disbarment; (5) threatening Hicks' company and demanding the payment of $10.3 million; (6) threatening JAMS with criminal activity for alleged non-reporting of bank fraud; (7) accusing the former arbiter of being involved in conspiratorial criminal misconduct; (8) repeatedly stating that various people who have opposed him should "rot in hell" (9) retaliating against Hicks for bringing this contractually provided-for arbitration; (10) threatening Kostolansky with civil, criminal and administrative prosecution; (11) becoming a shareholder of Health Grades only to spy on Hicks and obtain information to use in retaliation; (12) artificially creating and hiding behind a bank fraud claim in order to retaliate and intimidate Hicks;[13] and (13) knowing that Hicks did not commit bank fraud or have civil liability for fraud prior to the initial attorney general letters (letter from BOA, interview with Choppin, notes in the file, BOA repur-

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[13] Respondents are experts in the debt collection business and are aware of the possible cover (*i.e.*, reporting criminal or unethical conduct) one can try to use to justify their outrageous conduct; Cadle's misconduct is compounded by his subsequent acknowledgment that Hicks did not commit bank fraud. This acknowledgment was never communicated to the recipients of the prior accusations, and Cadle sent subsequent correspondence that again made bank fraud allegations

chase of note, Hicks statements, etc.).[14] In addition, the impending arbitration and the buy-back loss of the note, as well as losing BOA as a client, angered Cadle and led him to attack Hicks and Kostolansky. Moreover, respondents have several inhouse full-time attorneys and routinely hire "outside counsel" in many states, and their failure to research and analyze the law and the facts is inexcusable.

I conclude from this evidence that the respondents never had a good faith belief in their allegation against Hicks and that their accusations were made without an objective or subjective belief in their merits. The totality of respondents' conduct, especially that engaged in by Cadle and the alter ego corporations that he controls and is agent for, is atrocious and intolerable in a civilized community.

I also find that Shaulis' conduct is wanton and reckless, and he has engaged in outrageous conduct and intentional infliction of mental distress. While done largely at the behest and direction of Cadle, Shaulis wrote, signed and sent the defamatory letters to the state attorneys general and the later correspondence to the Colorado attorney general. Shaulis failed to factually and legally investigate these allegations, and he ignored significant information. His acts were intended to retaliate against and intimidate Hicks without a belief in the truth of the allegations. At all relevant times, he was acting as an agent of the corporate respondents. Nevertheless, while he is an important executive within the chain

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[14] As pertinent to intent and subsequent correspondence, the admission by BOA during the arbitration and the determination by arbiter Hinga that there was no bank fraud are pieces of evidence that respondents knew and chose to ignore.

of command of the various Cadle companies, Shaulis is largely under the control and command of Daniel Cadle. The evidence does not reflect that Shaulis was involved with Cadle's subsequent allegations, threats and retaliatory tactics. He also caused far less harm.

Accordingly, I find that Hicks has prevailed on his claim for outrageous conduct and award him damages in the amount of $750,000 as to Cadle and both corporate respondents. I award damages in the amount of $200,000 against Respondent Shaulis; the compensatory award against Shaulis is less than the award against Cadle because Shaulis caused only a part of the harm. If a stipulation is entered into by Hicks and Shaulis, as Hicks has suggested, I may reduce the compensatory award to $1.

Abuse of process

The elements of a claim for abuse of process are set forth in *Givens v. Mulikin*, 75 S.W.3d 383, 400 (Tenn. 2002), and include an ulterior motive and an act in the use of process other than would be proper in the regular prosecution of the charge. Where process is manipulated to obtain a collateral advantage, such as retribution or intimidation, the tort of abuse of process may exist. *Id.* at 400. The issuance of process itself, as opposed to subsequent misuse, is sufficient to state a claim. *Id.*

Claimant proved the elements of abuse of process with one exception. Claimant failed to prove that any legal process was commenced as a result of Cadle's or Shaulis' complaints. Generally, "process" is an act done under a court's authority to perpetuate an injustice for an improper purpose. While it is not clear, it generally appears that something more than making an allegation is necessary to constitute abuse of

process. *See Chemawa Country Golf, Inc. v. Wnuk*, 402 N.E.2d 1069 (Mass. App. 1980); 1 Am. Jur. 2d, Abuse of Process § 2. There must be an issuance at legal or judicial process, and there was none issued here.

Punitive damages

That respondents acted in an intentional, willful, wanton and malicious way in order to harm Hicks is beyond dispute and I so find. Thus, an award of punitive damages is warranted.

The factors to consider in awarding punitive damages are set forth in *Hodges v. S.C. Tool & Co.*, 833 S.W.2d 896, 901-02 (Tenn. 1992). My award is especially influenced by the respondents' financial affairs, financial condition and net worth; the nature and reprehensibility of the wrongdoing; respondents' knowledge of the falsity of the allegations; respondents' awareness of the harm being caused; respondents' motivation in causing the harm; the duration of the misconduct; and the failure to take any type of remedial action or attempt to make amends, despite being afforded the opportunity.

The nature and reprehensibility of respondents' wrongdoing, their awareness of the harm being caused, their motivation to cause the harm, and the duration of the misconduct have been set forth in the preceding portions of this award. I note that in addition to belatedly stating that the bank fraud allegations were not accurate, Cadle has also acknowledged that he does not know and does not care whether Hicks committed bank fraud.

I also find that Cadle has a net worth between $27 million and $40 million and that the corporate respondents are alter egos of each other and are

controlled by Cadle. Cadle has expressed his intent to continue to wage this malicious campaign against Hicks for the next ten years and beyond.

Cadle's companies are involved in 1,500 to 2,000 claims and/or lawsuits at any given time. The potential harm to the public through willful and wanton conduct, like that in this case, is substantial.

I find beyond a reasonable doubt that the conduct of all respondents has been intentional and/or malicious, entitling Hicks to an award of punitive damages against each of the respondents. I further find that the award of punitive damges should be and is $950,000, based upon the factors set forth in *Hodges* and my review and analysis of such factors against Cadle and the corporate respondents. I hereby enter an award of punitive damages against Shaulis in the amount of $10,000, but if the parties file a stipulated amount (i.e., $1), I will reduce this award.

RESPONDENTS' COUNTERCLAIMS

Abuse of process

Respondents contend that Hicks abused process by filing an action against them in the Denver District Court. I disagree. At the time Hicks commenced that action, none of the parties were holders of the promissory note and two of the four respondents were not parties to the pending arbitration. Thus there was no misuse of process, nor was there an ulterior motive in filing the suit. The only motive in filing the suit was to recover damages based upon the respondents' actions detailed above. Further, the respondents have failed to prove the other elements of this claim.

Tortious interference claims

Respondents' contention that Hicks tortiously interfered with their relationship with BOA is without merit. Hicks did not know of the agreement between BOA and any of the respondents at the time he asserted his non-liability in connection with the promissory note. Hicks' assertion of non-liability was a position he has taken and maintained consistently throughout the course of this matter. Maintaining this position does not constitute an intent to wrongfully interfere with a business relationship. The facts here also indicate that BOA decided to not do business with the respondents because of what they did here. Thus, there is no causation.

I find against the respondents in connection with all counterclaims brought against Hicks.

AWARD

For the reasons set forth above, I hereby enter my award as follows: I find in favor of Hicks and against all respondents in connection with Hicks' claims for defamation and outrageous conduct. I find in favor of all respondents and against Hicks on abuse of process. For the claims of defamation and outrageous conduct, I enter a compensatory damages award of $750,000 for each tort but determine that the damages overlap and/or are identical. In other words, the total compensatory damages that Hicks is awarded is $750,000. The award is entered against Daniel C. Cadle, but the Respondents Buckeye Retirement Co., LLC, Ltd.; and The Cadle Company are jointly and severally liable. I award $200,000 against Shaulis in connection with such claims, but pursuant to Hicks' request, I may reduce the amount to $1 if Hicks and

Shaulis provide a stipulation to that effect within the next several days.

I also find that Hicks has proven beyond a reasonable doubt entitlement to punitive damages. I award Hicks $950,000 in punitive damages against Cadle; Buckeye Retirement Co., LLC, Ltd.; and The Cadle Company. I award Hicks $10,000 in punitive damages against Shaulis; Buckeye Retirement Co., LLC, Ltd; and The Cadle Company, but, pursuant to Hicks' request, I may reduce the amount to $1 if Hicks and Shaulis provide a stipulation to that effect within the next several days.[15]

So ordered.

DATED: May 14, 2007.

/s/ Frank N. Dubofsky
Frank N. Dubofsky, Arbiter

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[15] I am concerned about Hicks' request to enter $1 awards against Shaulis. While I understand the generosity that lead to this request, I do not believe my award should be unilaterally determined by either party. If the parties jointly or collectively stipulate and agree to vacate my award and enter a $1 award, I will likely do so.

In the Arbitration of:

Kerry R. Hicks,
Claimant,

v.

Bank of America, N.A.; The Cadle Company; Buckeye Retirement Co., LLC; Daniel C. Cadle and William E. Shaulis,
Respondents.

RULING ON AFFIRMATIVE DEFENSES

Respondents have raised several affirmative defenses which, in their view, provide a complete defense to claimant's three claims. These defenses are based on Tennessee statutes and common law.

Discussion of Truth as a Defense to the Bank Fraud Allegations

It is generally recognized that truth is a defense to a libel claim. Further, to the extent that respondents' statements are part of the intentional infliction of mental distress claim and they are truthful, this may impair the viability of that claim. The primary statutory provisions that apply to the bank fraud allegations are 18 U.S.C. § 1344(1) and 18 U.S.C. § 1344(2).

Respondents argue that they only need a reasoned belief that the allegations of bank fraud or perjury are true to invoke the affirmative defense of truth. While this defense is dealt in my decision, I will briefly address it here.

Under these facts and circumstances, I conclude that respondents did not have either a reasonable

objective basis or subjective belief in the truth of the allegations of bank fraud or perjury. Here the record is replete with evidence that BOA senior vice president Walter Choppin made an oral agreement with the claimant Kerry Hicks to limit Hicks' liability to $2 million and not to also obligate him on the $1 million loan to Patrick Jaeckle.[1] If a senior vice president makes an oral agreement to a borrower in apparent derogation of the terms of a written contract, the borrower does not commit bank fraud or perjury when he adheres to the oral agreement.

There are numerous reasons why Choppin and Hicks would make this oral agreement: (1) Hicks would not buy Health Grades without the oral promise; (2) the bank had more than $45 million in outstanding loans to SCN, and it was critical for BOA to work with Hicks; (3) the viability of BOA loans to SCN and Health Grades might depend on the loans to Hicks and Jaeckle; and (4) the oral agreement was an "accomodation" to BOA and Hicks.

While, as respondents argue, BOA might have been able to enforce the written joint and several liability note, it would have contradicted its oral agreement to do so. Further, Hicks asserts that the subsequent loan subordinating agreement ("L.S.A.") recognizes and validates this oral understanding that limits Hicks' liability to $2 million. The L.S.A. statement

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[1] When the early notes were signed by BOA, Jaeckle and Hicks—as well as BOA—had an expectation that Jaeckle and/or his securities would pay the $1 million. Largely because of BOA tardiness in perfecting the bank's interest in Jaeckle's securities, the value of the securities greatly diminished. Certainly, BOA's lack of enforcement of the note against Hicks during the time it held the note reflects this understanding. The notes in the BOA/Buckeye file also reflect that Hicks was not liable.

that "certain other conditions exist that do not need to be recited at length" arguably also provides a legal basis to modify the joint and several liability clause. While Hicks' analysis on this question may be accurate, a resolution of the issue does not change the presence or absence of bank fraud here. The L.S.A., however, is another reason why there was no bank fraud.

The facts tell the story of why there was no bank fraud. Respondent Daniel Cadle's testimony shows that respondents have previously used claims of criminal misconduct to retaliate, intimidate and besmirch perceived adversaries. Respondents have a view that such activity is a legitimate aspect of civil litigation as long as they as they make such claims rather than only threatening to make them.

Further, the actions and statements of BOA demonstrate that it conclusively determined that Hicks did not commit bank fraud. Thus, the alleged victim of the bank fraud concluded that there was no bank fraud. There cannot be bank fraud if the bank was not defrauded.[2]

The notes in the BOA/Buckeye file show that despite the joint and several liability note, BOA did not consider Hicks to be liable on the note. Further, Choppin told Buckeye's file manager (Denise Harkless) the same thing and confirmed Hicks' understanding of the oral agreement. BOA's and Hicks' actions and words confirm the oral agreement and Hicks' lack of liability.

[2] For the reasons stated in my decision and incorporated here by reference, there was no bank fraud or perjury.

Respondents were fully aware of this information and chose to ignore it. They filed numerous different bank fraud and perjury charges to retaliate against Hicks, to intimidate and harass him, and to gain an advantage.[3]

Further, respondents failed to factually and legally investigate the situation. Respondents have extraordinary resources. Here they failed to read or consider the bank fraud statute and its elements. They failed to include many exonerating facts in the letters alleging bank fraud. They ignored critical contrary information.

Cadle's acknowledgment that Hicks did not commit bank fraud is relevant to the legitimacy of his assertion of the affirmative defense that truth is a defense as well as to his subsequent claims of bank fraud. Consequently, I find that that the allegations of bank fraud/perjury were unfounded and that respondents failed to fairly investigate and report the claims. This entire effort by respondents was a ruse to intimidate, retaliate, punish and harass Hicks. There was no basis to claim bank fraud or perjury, and the allegations were made to retaliate and intimidate Hicks and others.

Tennessee 1977 Anti-SLAPP statute.

The Tennessee anti-SLAPP statute, T.C.A. § 4-21-1001 *et seq.*, does not provide immunity if the person reporting criminal or other activities to governmental bodies knew the information reported was false or the person reporting was reckless or negligent in

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[3] Other than the correspondence that Respondent William E. Shaulis signed, there is no proof that Shaulis actively participated in the subsequent oral and written accusations that Cadle made against Hicks.

ascertaining the truth of the information. As previously indicated, there was no bank fraud or perjury, and therefore under any objective evaluation of the facts, truth is not a defense.

Cadle's and Shaulis' purpose in "reporting" these offenses was not to deal with a crime committed by Hicks. Rather, "bank fraud" was reported to retaliate, intimidate, harass and punish Hicks. Despite extraordinary resources available to him, Shaulis acknowledged that he never determined what the elements of bank fraud were. He did not thoroughly review the BOA/Buckeye file where he would have seen information exonerating Hicks. The views of the apparent victim (BOA) were given no weight.

Despite acknowledging that there was no bank fraud, Cadle continued to make such claims to other governmental agencies. There is no evidence that Cadle reviewed the legal definition of bank fraud in the United States Code or otherwise connected the facts and the law prior to making these complaints.

Further, Cadle has acknowledged that he only purchased Health Grades' stock in order to spy on and harass Hicks. Cadle's and Shaulis' claims of bank fraud were to retaliate for Hicks' allegedly coming between BOA and respondents and for making his arbitration claim. Cadle's true motivation is demonstrated through the vengeful and retaliatory claims also made against Kostolansky, Hinga, and JAMS. Cadle has threatened criminal and civil prosecution. These threats are intended to intimidate everyone in the arbitration process who might make a decision adverse to him.

Like arbiter Hinga, I reject the notion that respondents' complaints filed with governmental agencies

were brought from a moral or activist duty. As arbiter Hinga determined, the respondents' conduct in accusing Hicks of bank fraud was outrageous.

For all of these reasons and those stated in my decision, I conclude that the respondents' actions and statements are not protected under the Tennessee anti-SLAPP law. Moreover, I find that respondents negligently and recklessly failed to appropriately investigate this matter and to include critical information in the correspondence. The failure to include this relevant information created a false picture. Respondents' reporting of bank fraud or perjury was not made in good faith, and they falsely, recklessly and negligently accused Hicks of committing crimes.

Tennessee Money-Laundering statute

Respondents' affirmative defense is based primarily on the Tennesee Money laundering Act, T.C.A. § 39-14-901 et seq. Claimant argues that the grant of immunity for persons who report money laundering in section 39-14-909 is inapplicable here, and therefore, the more general "anti-SLAPP" Tennessee law applies. I agree with the claimant's position.

Section 39-14-901 states:

Money Laundering Offenses

1. Short title—

This part shall be known and may be cited as the Money Laundering Act of 1996. Despite the location of section 39-14-909 in the Money Laundering Act of 1996, respondents rely on the wording of section 39-14-909, which states:

> **Immunity from civil liability.** The reporting of a financial transaction by a corporation or other business entity to a regulator or law

> enforcement official or agency shall not create a cause of action against the person, corporation or business entity which made the report and the same shall be immune from liability of such report.

Respondents implicitly claim that irrespective of whether claimant's alleged actions are considered money laundering, the immunity grant in section 39-14-909 applies and protects them from suit for the allegations of bank fraud or perjury made to numerous law enforcement officials.

Hicks alleged that the activities here do not fall within the Money Laundering Act and therefore are not protected by section 39-14-909. The wording of section 39-14-901 et seq. makes it clear that the legislature intended to only provide immunity to reports of money laundering activities. *See State v. Jackson*, 124 S.W.3d 139 (Tenn. 2003) (legislature did not intend that conduct such as simple forgery or attempting to pass forged instruments are included under money laundering). It is apparent here that two parties orally agreeing on the contract terms of a loan does not fall within the Money Laundering Act. Nor does the perjury charge fall within the Act.

It would be inconsistent to find that the Money Laundering Act does not cover this alleged offense and to then find that the immunity provision extends beyond crimes covered by the Money Laundering Act itself. *See Warner v. Glass*, 135 S.W.3d 681 (Tex. 2004). The legislature intended the immunity provision to extend to crimes covered by the Money Laundering Act and not to crimes outside the Act. *See Farmer v. Wiseman*, 151 S.W.2d 1085 (Tenn. 1947). The Money Laundering Act should be consistently and not absurdly construed.

Money laundering is a special type of illegal activity for which an immunity grant may be critical to its detection, reporting and prosecution. Money laundering often involves significant on-going, repetitious criminal conduct that is difficult to detect and poses significant risk of harm to the informant. Here, the alleged wrongful activity is not money laundering and is not within the ambit of the statute.

Further, the respondents' complaints never alleged or suggested that the accusations involved money laundering activity under sections 39-14-901 et seq. It would create an absurd result to conclude that there was no allegation of a crime under the Money Laundering Act, yet the immunity provided by the statute included non-money laundering crimes. Moreover, throughout this litigation, the respondents (particularly Cadle) have referred to Tennessee's anti-SLAPP law as the relevant law.

Finally, the immunity protection and the wording of section 39-14-909 only applies to certain financial transactions reported by a corporation or other business entity to an enforcement official. The term "financial transaction" is defined and does not apply to a transaction conducted in the ordinary course of business where there is a duty to comply with state or federal currency transaction disclosures unless the person or corporation intentionally violates or circumvents such reporting or recording requirements.

If section 39-14-909 applies to non-money laundering offenses, then respondents have failed to prove that there was a deliberate failure to report this transaction to state and/or federal authorities. The

burden of proof is on the party asserting the defense to prove its applicability.[4]

Tennessee created its anti-SLAPP immunity statute to protect the reporting of criminal allegations as long as the reporter's actions did not intentionally, recklessly or carelessly convey false information to law enforcement. As long as immunity for money laundering crimes is under section 39-14-909, then there is a certain symmetry with the anti-SLAPP statute. If, however, a multitude of unrelated non-money laundering crimes come under section 39-14-909, ambiguity and conflict among immunity laws will exist. In construing statutes, such conflict and ambiguity is to be avoided. Tennessee's anti-SLAPP law does a better job of holding reporters responsible in retaliatory, retributive, false and malicious situations.

Respondents' affirmative defenses are rejected.

DATED: May 14, 2007.

/s/ Frank N. Dubofsky
Frank N. Dubofsky, Arbiter

[4] I also note that to fall under section 39-14-901 et seq. there must be criminally-derived proceeds from a specific criminal activity that are hidden or disguised. That did not happen here.

In the Arbitration of:

Kerry R. Hicks,

Claimant,

v.

Bank of America, N.A.; The Cadle Company; Buckeye Retirement Co., LLC; Daniel C. Cadle and William E. Shaulis,

Respondents.

FINAL AWARD

My Order and my Ruling on Affirmative Defenses, both issued on May 14, 2007, and this Award together constitute my Final Award. My order and my Ruling on Affirmative Defenses are modified as follows:

1. I confirm that The Cadle Company and Buckeye Retirement, LLC, are jointly and severally liable for the $200,000.00 compensatory damages award entered William B. Shaulis. See Rule 24(g) of JAMS rule requiring me to make a determination on each claim as to each party.

2. I award prejudgment interest on the $950,000.00 compensatory damages awards at 10% per annum from September 27, 2004, and

3. I award post-judgment interest on the Award at 10% per annum from the date the award is confirmed by judgment of the court.

It is so ordered.

Dated this 18 day of June, 2007.

/s/ Frank N. Dubofsky
Frank N. Dubofsky, Arbiter

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

[Filed: January 7, 2010]

Nos. 08-1306, 1307, 1429 & 1435
(D.C. No. 1:04-CV-02616-ZLW-KLM)
(D. Colo.)

KERRY R. HICKS,
Plaintiff-Appellee/
Cross-Appellant,

v.

THE CADLE COMPANY;
BUCKEYE RETIREMENT CO., LLC, LTD.;
WILLIAM E. SHAULIS; DANIEL C. CADLE,
Defendants-Appellants/
Cross-Appellees.

ORDER

Before **HENRY**, Chief Judge, **PORFILIO**, and **HARTZ**, Circuit Judges.

The petition for rehearing filed by The Cadle Company, Buckeye Retirement Co., LLC, Ltd., and William E. Shaulis is denied.

Their petition for rehearing en banc was transmitted to all of the judges of the court who are in regular

active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, the petition for rehearing en banc is also denied.

Entered for the Court,

/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER, Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

[Filed: February 8, 2010]

Nos. 08-1306, 08-1307, 08-1429 & 08-1435
(D.C. No. 1:04-CV-02616-ZLW-KLM)
(D. Colo.)

KERRY R. HICKS,
Plaintiff-Appellee/
Cross-Appellant,

v.

THE CADLE COMPANY; BUCKEYE RETIREMENT CO., LLC, LTD.; WILLIAM E. SHAULIS; DANIEL C. CADLE,
Defendants-Appellants/
Cross-Appellees.

ORDER

Before **HENRY**, Chief Judge, **PORFILIO**, and **HARTZ**, Circuit Judges.

Daniel C. Cadle's petition for rehearing is denied.

His petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. Because no member of the panel and no judge in regular active service on the court re-

quested that the court be polled, that petition is also denied.

Entered for the Court,

/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER, Clerk

No. 09-1503

Supreme Court, U.S.
FILED
JUN 8 - 2010
OFFICE OF THE CLERK

In The

Supreme Court of the United States

THE CADLE COMPANY, et al.,

Petitioners,

v.

KERRY R. HICKS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Respondent Kerry R. Hicks objects to the Questions Presented by Petitioners and, according to Supreme Court Rule 24, alternatively identifies the Question Presented as follows:

Whether the Tenth Circuit properly affirmed the District Court's finding that the Arbitrator had jurisdiction over the Petitioners and the claims in Phase II when (a) Petitioners agreed to and specifically requested arbitration; and (b) Petitioners are bound by a broad arbitration provision that encompassed the Phase II claims.

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STATEMENT OF THE CASE

I. GENESIS OF DISPUTE

In December 1999, Respondent Kerry R. Hicks and others entered into a promissory note with Bank of America ("BOA"), whereby Mr. Hicks committed to repay $2,000,000 of a $3,550,000 debt. ("Promissory Note" or "Note"). (Appendix to Appellants' Brief ("Aplt.App.") 107-11.) The Note contains a broad, mandatory arbitration provision ("Arbitration Provision"):

> ANY CONTROVERSY OR CLAIM BETWEEN OR AMONG THE PARTIES HERETO INCLUDING BUT NOT LIMITED TO THOSE ARISING OUT OF OR RELATING TO THIS INSTRUMENT, AGREEMENT OR DOCUMENT OR ANY RELATED INSTRUMENTS, AGREEMENTS OR DOCUMENTS, INCLUDING ANY CLAIM BASED ON OR ARISING FROM AN ALLEGED TORT, SHALL BE DETERMINED BY BINDING ARBITRATION. . . .

(Aplt.App. 110 ¶17.) The Note, by its own terms, was binding on BOA's successors. (*Id.* ¶15.)

On October 1, 2002, Petitioners The Cadle Company ("TCC") and Buckeye Retirement Co. LLC, Ltd. ("Buckeye") acquired the Note from BOA. (Aplt.App. 943-91.) Almost immediately, Petitioners pursued collection of the debt from Mr. Hicks, despite Mr. Hicks' payment in full of his obligation. Mr. Hicks denied liability and thoroughly explained his position

to Petitioners. (Aplt.App. 992-96.) BOA advised TCC and Buckeye that Mr. Hicks was not liable on the Note. (Aplt.App. 215.) TCC's internal investigation further confirmed that Mr. Hicks was not liable. (Appendix C to Petition (App. C) 55a-56a.) However, because they thought he could pay, and would pay if harassed, Petitioners sued Mr. Hicks in Tennessee federal court in violation of the Arbitration Provision. *Hicks v. Bank of Am.*, 218 F. App'x 739 (10th Cir. Feb. 21, 2007). Despite knowing Mr. Hicks had no liability, Petitioners began a systematic and calculated campaign to attempt to spur state and federal government authorities to prosecute Mr. Hicks for bank fraud and perjury, criminal allegations in which Petitioners had neither a "reasonable objective basis or subjective belief. . . ." (App. C 76a.)

II. THE ARBITRATION – PHASE I

On October 23, 2003, Mr. Hicks filed a Demand for Arbitration with J.A.M.S./Endispute in Denver, Colorado ("JAMS") against Petitioners TCC and Buckeye asserting claims related to their filing suit against Mr. Hicks in Tennessee in violation of the arbitration and venue provisions in the Note ("Phase I"). *See Hicks*, 218 F. App'x at 743. On September 27, 2004, less than one month before the arbitration hearing commenced, Petitioners wrongfully accused Mr. Hicks of criminal conduct, namely bank fraud, in letters sent to the Attorneys General of Colorado and Tennessee, designed to trigger the criminal prosecution of Mr. Hicks. (Aplt.App. 784-87.)

As a result of these criminal allegations, the arbitration hearing set to begin on October 4, 2004 was continued.

On December 3, 2004, Mr. Hicks filed a complaint in Colorado state court against BOA and Petitioners. (Appellee/Cross-Appellant's Supplemental Appendix ("Aplee.Supp.App.") 1-21.) The Complaint asserted claims identical to those pending in the arbitration, plus additional claims for defamation and outrageous conduct stemming from the false allegations of bank fraud Petitioners lodged with governmental authorities. (*Compare id. with* Aplt.App. 841-69.) On December 20, 2004, BOA removed the state court action to the United States District Court for the District of Colorado ("District Court") and simultaneously moved to stay the action during the ongoing arbitration before JAMS. (Aplt.App. 1-2; Aplee.Supp.App. 22-29.) The Petitioners joined BOA's motion to stay on January 4, 2005, stating that "***[t]his action must proceed to arbitration*** as the arbitration clause in the Promissory Note ***clearly encompasses all issues and claims*** asserted by Hicks." (Aplee.Supp.App. 33 (emphasis added).)

On January 13, 2005, Mr. Hicks filed an Amended Complaint with the District Court, which focused on his claims against these Petitioners. (Aplt.App. 315-22.) On January 14, 2005, the District Court stayed the action and ordered the parties to arbitrate all claims in the Amended Complaint. (Aplee.Supp.App. 51-53.) On January 25, 2005, Arbiter James D. Hinga confirmed that he had jurisdiction over the claims

asserted in Mr. Hicks' Amended Complaint, but bifurcated those claims to a subsequent proceeding ("Phase II"). (Aplt.App. 387 ¶6.) The Phase I claims were then tried to Arbiter Hinga on February 1-5, 2005. As a result of their illegal debt collection, Arbiter Hinga found in favor of Mr. Hicks on his abuse of process claim against Defendants TCC and Buckeye, holding:

> The conduct of [TCC] and/or Buckeye I find to be offensive. The filing of the lawsuit in Tennessee when you have a non-ambiguous arbitration clause shows a complete disrespect for the law. There was testimony that it is local practice to file a lawsuit first and then the defendant must file a pleading affirmatively alleging the arbitration clause. I do not find this persuasive. Indeed, [TCC employee] Harkless admitted that she knew that there was an arbitration clause in the note, but that gave her no pause. . . . I find that by filing this case in Federal Court in Tennessee, [TCC] and Buckeye abused the process and Court system. This award and all my awards shall enter against both [TCC] and Buckeye.
>
> The callousness of the actions of both Shaulis and Harkless on behalf of Buckeye and [TCC] is shocking. They had knowledge two months before the lawsuit was filed that [BOA] was of the opinion that Hicks was not responsible on the note. The evidence was certainly enough to put [TCC] and Buckeye on investigative notice, which they did as

> Harkless called [BOA officer] Choppin who said Hicks was not liable. Before purchasing the note, [TCC's] due diligence officer saw evidence in [BOA's] file that Mr. Hicks may not be liable under the note. They received a letter [from BOA's] attorney that said Hicks was not responsible, yet they went [forward] with their collection efforts in Court because the arbitration clause gave Harkless no pause.

(Aplt.App. 54-55.) *See also Hicks*, 218 F. App'x at 744.

On April 4, 2005, Arbiter Hinga awarded Mr. Hicks $415,587.36 in damages against TCC and Buckeye. (Aplt.App. 54-56.) On April 28, 2005, the Arbiter issued his Final Arbitration Award. (Aplt.App. 57.) On October 26, 2005, the District Court confirmed the Phase I Arbitration Award with respect to Mr. Hicks' claims against TCC and Buckeye. (Aplt.App. 60-64.) On February 21, 2007, the Tenth Circuit affirmed the Phase I confirmation orders. *Hicks*, 218 F. App'x at 739. Petitioners did not file a petition for writ of certiorari with respect to the Tenth Circuit's February 2007 Order. The District Court Clerk entered judgment in favor of Mr. Hicks for the Phase I claims on October 10, 2008. (Aplt.App. 37-38.)

III. THE ARBITRATION – PHASE II

On April 8, 2005, Mr. Hicks filed his Statement of Claims for Phase II, which set forth claims identical

to the Amended Complaint bifurcated from Phase I. (Aplt.App. 65-71.) Phase II of the arbitration was heard before Arbiter Hinga on February 28-March 3, 2006. Prior to issuing his ruling, however, Arbiter Hinga passed away. Retired Judge Frank N. Dubofsky was selected as the new arbitrator ("Judge Dubofsky" or "Arbitrator").

As Mr. Hicks learned during Phase II, Petitioners' initial letters to the Tennessee and Colorado Attorneys General were merely the beginning of Petitioners' efforts to destroy Mr. Hicks. The Petitioners continued their "relentless campaign to defame, intimidate and harass Hicks by raising alleged bank fraud, perjury and other serious allegations against Hicks before numerous other governmental and private bodies," and did so with the intent "to retaliate against Hicks for [Petitioners'] loss of a business relationship with BOA (which [Petitioners] caused), for contesting Cadle's position, for trying to force Hicks to compromise his civil claims in order to avoid criminal prosecution, and to intimidate others in the process." (App. C 57a (footnotes omitted).) Thus, Petitioners sent no less than eight letters to various government authorities and law enforcement agencies accusing Mr. Hicks of having committed bank fraud in relation to the Promissory Note and accusing Mr. Hicks of committing perjury by lying about bank fraud. (*See* App. C 56a-57a n.4.) Petitioners further perpetuated their defamatory scheme through oral communications with such authorities. (*Id.*)

A second hearing on Phase II was held October 10-12, 2006. Because "there was no bank fraud in this case," and because "the perjury claim is without merit and used to retaliate and intimidate Hicks," Judge Dubofsky found the letters and oral statements accusing Mr. Hicks of bank fraud and perjury to be defamatory. (App. C 60a, 66a-68a.) Judge Dubofsky further found Petitioners to have engaged in at least thirteen acts of outrageous conduct. (*Id.* at 69a-70a.) He explained:

> [T]he totality of the statements and actions of [Petitioners] constitute conduct that goes beyond all bounds of decency and is considered atrocious and intolerable in a civilized community. I have never seen a party to a lawsuit engage in such relentless, protracted and destructive conduct to harm another individual.

(*Id.* at 68a.)

Judge Dubofsky's findings were consistent with those of every judicial officer that considered Petitioners' conduct in this case. In granting Mr. Hicks' petition for a permanent civil protection order against Defendant Daniel C. Cadle, Jefferson County Court Judge Thomas Ettenberg found that Mr. Cadle used the arbitration process as a "subterfuge" to send communications designed to cause Mr. Hicks severe emotional distress. (Aplee.Supp.App. 103.) In addition, Mr. Cadle filed a derivative action against Mr. Hicks' employer, Health Grades, Inc., its Board of Directors, and senior management, based, in part,

upon a February 13, 2006 letter from Mr. Cadle to the Board demanding payment to TCC of $10.3 million. United States District Court Judge Richard Matsch found that Mr. Cadle's outrageous demand had "all the appearance of extortion." (Aplee.Supp.App. 110.)

On June 18, 2007, Judge Dubofsky entered his Final Award. (App. C 85a.) The Final Award awarded Mr. Hicks $1,910,000, consisting of $950,000 in compensatory and $960,000 in punitive damages, and ruled against Petitioners on their counterclaims. The Final Award further granted Mr. Hicks pre-award interest on compensatory damages from September 27, 2004, and post-award, prejudgment interest from the date of the Final Award through confirmation at 10% per annum, in accordance with Tennessee law. (*Id.*)

On July 23, 2008, the District Court confirmed the Phase III Final Award, except the award of interest on compensatory damages. (Aplt.App. 6-30.) On August 12, 2008, Mr. Hicks moved the District Court to certify as final its October 26, 2005 and July 23, 2008 Orders confirming the Phase I and II Final Awards, pursuant to F.R.C.P. 54(b), and for an award of post-award, prejudgment interest. (Aplee.Supp.App. 112-67.) The Petitioners opposed the motion. (Aplee.Supp.App. 168-72, 173-83.) On October 7, 2008, the District Court granted in part and denied in part Mr. Hicks' motion. (Aplt.App. 31-36.) The District Court certified the Phase I and Phase II confirmation orders as final, but denied Mr. Hicks' request for post-award, prejudgment interest.

On October 10, 2008, the Clerk entered final judgment. (Aplt.App. 37-38.)

Petitioners appealed the District Court's Judgment to the Tenth Circuit. Mr. Hicks also filed a Notice of Appeal, challenging only the District Court's failure to award post-award, prejudgment interest. The Tenth Circuit consolidated the cases on appeal. On December 7, 2009, the Tenth Circuit affirmed the District Court's confirmation of the Phase II Final Award and reversed the District Court's vacatur of post-award, prejudgment interest. (Appendix A to the Petition (App. A).) The Petition for Writ of Certiorari ("Petition") stems from the Tenth Circuit's December 2009 Order. This Court should reject Petitioners' attenuated arguments, which are only designed to delay the just resolution of Mr. Hicks' claims, and deny the Petition.

IV. THE ARBITRATION – PHASE III

During Phase II, Petitioner Cadle vowed "to continue to wage this malicious campaign against Hicks for the next ten years and beyond" and "to continue making such [false bank fraud] allegations even after the conclusions of this arbitration." (App. C 73a.) Consistent with this threat, Mr. Cadle sent more defamatory letters to additional governmental entities after Judge Dubofsky issued his Final Award. As a result, on July 20, 2007, Mr. Hicks moved the District Court for leave to file his Second Amended Complaint, seeking damages for these additional letters and other related false statements,

and to compel arbitration of the same. Retired Judge John Leopold served as the Arbitrator for Phase III, which was tried over eleven separate hearing days between August 10, 2009 and December 3, 2009. Judge Leopold found Mr. Cadle liable, again, for defamation and outrageous conduct, and awarded Mr. Hicks $1,250,000 in compensatory damages and $1,900,000 in punitive damages. The Phase III arbitration award currently is subject to motions to confirm and vacate before the District Court.

ARGUMENT

I. THIS CASE DOES NOT PRESENT A "COMPELLING REASON" TO GRANT THE PETITION.

This Court has recognized the importance of arbitration as an alternative form of dispute resolution. Cases like this one, which were tried and decided within the broad parameters of arbitral jurisdiction, do not present "compelling reasons" to grant a petition for writ of certiorari. The result here is consistent with this Court's decisions regarding arbitral jurisdiction. Furthermore, despite their transparent arguments to the contrary, Petitioners here are judicially estopped from contesting arbitral jurisdiction.

There are no "compelling reasons" for certiorari review. Supreme Court Rule 10 provides:

> A petition for writ of certiorari will be granted only for compelling reasons. The

> following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter . . . ;
>
> (c) a . . . United States court of appeals has decided an important question of federal law that has not been, but should be settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.
>
> A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Petitioners assert the Court should grant the Petition because: (1) the Tenth Circuit's decision purportedly conflicts with the Court's recent decision in *Stolt-Nielsen S.A. v. AnimalFeeds International Corporation*, 559 U.S. __, 130 S.Ct. 1758 (April 27, 2010); (2) the Tenth Circuit allegedly disregarded *Litton Financial Printing Division v. NLRB*, 501 U.S. 190 (1991); and (3) supposedly there is a circuit split regarding application of the *Litton* test. None of these bases warrant further review by this Court.

II. THE TENTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH *STOLT-NIELSEN*.

On April 27, 2010, this Court decided *Stolt-Nielsen S.A. v. AnimalFeeds International Corporation*, 559 U.S. ___, 130 S.Ct. 1758 (April 27, 2010). Petitioners argue that this Court should grant their Petition because the Tenth Circuit's decision purportedly conflicts with new precedent established by *Stolt-Nielsen*. *Stolt-Nielsen*, however, merely reemphasizes the existing doctrine of this Court regarding arbitrability of disputes. It does not create new law. Furthermore, the Tenth Circuit's decision does not conflict with the *Stolt-Nielsen* decision.

A. *Stolt-Nielsen* Did Not Create New Law And The Tenth Circuit Applied This Court's Principles of Arbitrability.

While arguing that *Stolt-Nielsen* creates new law, Petitioners simultaneously admit that *Stolt-Nielsen* merely "reaffirmed that arbitration is a matter of consent, not coercion." (Petition ("Pet.") 22.)[1] This Court acknowledged as much in the *Stolt-Nielsen* opinion: "***[W]e have said on numerous occasions*** that the central or 'primary' purpose of the FAA is to ensure

[1] Accordingly, Petitioner's request that this Court grant certiorari, vacate the judgment below, and remand for further consideration (GVR) should be denied as *Stolt-Nielsen* does not create new precedent. (Pet. 23.)

that 'private agreements to arbitrate are enforced according to their terms.'" *Stolt-Nielsen*, 130 S.Ct. at 1773 (quoting *Volt Inf. Scis., Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 479 (1989); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995)) (emphasis added). This Court continued, "[w]e think it is also clear ***from our precedents*** and the contractual nature of arbitration that parties may specify ***with whom*** they choose to arbitrate their disputes." *Id.* at 1774 (first emphasis added). While *Stolt-Nielsen* took on unique issues involving maritime law and class arbitration, it did not change the fundamental principles regarding arbitrability of disputes that this Court has articulated time and again.

In its decision, the Tenth Circuit acknowledged and applied this long-standing precedent. The Tenth Circuit stated:

> As the parties are well aware, we begin with the strong federal policy, evinced by the FAA, in favor of arbitration for resolving disputes. But "the FAA's proarbitration policy does not operate without regard to the wishes of the contracting parties." *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995); [additional citations omitted]. Because "arbitration is a matter of contract, . . . a party cannot be required to submit to arbitration any dispute which he has not agreed to submit."

(App. A 9a (citation omitted).) The Tenth Circuit ultimately concluded that Petitioners were parties to the Promissory Note and agreed to arbitrate the Phase III claims under the Arbitration Provision. The terms of the Note clearly and unambiguously state that it binds the "parties hereto" and their successors. (Aplt.App. 110 ¶15.) That Petitioners disagree with the Tenth Circuit's rationale certainly does not justify this Court's grant of the Petition.

B. This Case Does Not Run Afoul of *Stolt-Nielsen*.

The circumstances of this case vary markedly from those in *Stolt-Nielsen*. In this case, it has been determined repeatedly that Petitioners are judicially estopped from contesting arbitral jurisdiction. (*See, e.g.*, Aplt.App. 45-50; App. A 9a-11a, Appendix B to Petition (App. B) 34a-36a.) *See also Hicks*, 218 F. App'x at 746. Petitioners asked the District Court to compel arbitration of the claims Mr. Hicks asserted in his Amended Complaint. Specifically, Petitioners stated: "This action must proceed to arbitration as the arbitration clause in the Promissory Note clearly encompasses all issues and claims asserted by Hicks." (Aplee.Supp.App. 33.) Those claims included the tort claims of defamation and outrageous conduct Mr. Hicks ultimately succeeded upon in Phase II. Having asked the District Court to compel arbitration, Petitioners cannot now argue that the Arbitrator lacked jurisdiction over those claims.

This issue was raised before and resolved by the District Court in March 2005, when the District Court clarified its Order compelling arbitration, and again in the District Court's order confirming the Phase II arbitration. (Aplt.App. 45-50; App. B 36a-37a.) The issue was further raised before and resolved by the Tenth Circuit in its decision affirming the Phase II confirmation. (App. A 9a-11a.) This is the law of the case. *Arizona v. California*, 460 U.S. 605, 618 (1983). Petitioners consented to arbitration of the Phase II claims and are judicially estopped from contesting arbitral jurisdiction now.

Stolt-Nielsen involved "class arbitration," not judicial estoppel. The bedrock of that decision and the bedrock of the Tenth Circuit's decision here do not conflict in the slightest. Thus, there is no basis to grant the Petition based upon a purported conflict with precedent of this Court.

1. Petitioners Are Judicially Estopped From Contesting Arbitral Jurisdiction.

Petitioners attempt to avoid the consequences of their affirmative representation by first arguing that judicial estoppel is not a ground for compelling arbitration under the FAA. (Pet. 28.) Petitioners' argument misses the mark. In this case, application of judicial estoppel does not provide an independent ground outside the FAA justifying arbitral jurisdiction. Instead, by joining in BOA's motion to stay

proceedings pending resolution of Arbitration, Petitioners expressly acknowledged the existence of the written arbitration agreement and consented to arbitral jurisdiction. Section 3 of the FAA provides:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, ***shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement***. . . .

9 U.S.C. § 3 (emphasis added). If Petitioners did not believe a written arbitration agreement existed that covered the claims and parties in issue, they would not have moved the District Court to stay the proceedings pending arbitration. Thus, Petitioners voluntarily and consensually agreed to arbitrate their dispute with Mr. Hicks under the written arbitration agreement. Judicial estoppel merely prevents Petitioners from later changing their position.

Petitioners next argue that the requirements of judicial estoppel were not met because, according to Petitioners, a "party can be bound to a prior position only if the 'party's later position [is] "clearly inconsistent" with its earlier position.'" (Pet. 28.) Petitioners cite *New Hampshire v. Maine*, 532 U.S. 742

(2001) to support their argument. Again, Petitioners are wrong.

First, this Court in *New Hampshire* actually held that "the circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle," and then identified a number of potential considerations, including "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *Id.* at 750-51. The Court summarized its analysis:

> In enumerating these factors, we do not establish inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel. Additional considerations may inform the doctrine's application in specific factual contexts. In this case, we simply observe that the factors above firmly tip the balance of equities in favor of barring New Hampshire's present complaint.

Id. at 751.

The District Court and the Tenth Circuit articulated their rationale for applying judicial estoppel in this case, which included consideration of unfair advantage and unfair detriment. As the District Court explained:

> . . . Defendants' statement that this action must proceed to arbitration in essence requested the Court to compel the parties to

> arbitrate. By making the request, all Defendants consented to the jurisdiction of the arbitrator for resolution of all claims set forth in the Amended Complaint. In staying this action, the Court relied on this consent so that, as requested by Defendants, all claims among the parties to this action could be arbitrated. Therefore, judicial estoppel precludes any of the Defendants from claiming they are not subject to the arbitrator's jurisdiction for resolution of the claims in the Amended Complaint.
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> * * *
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> Finally, if not estopped, Shaulis and Cadle would "derive an unfair advantage or impose an unfair detriment on" Plaintiff by delaying Plaintiff's right to proceed against them in this action without further delay.

(Aplt.App. 47.) The Tenth Circuit further explained:

> In our decision affirming the first phase of arbitration, we noted that defendants waived any objection to arbitration and were estopped from asserting that the arbitrator lacked jurisdiction because they had stated, when they joined Bank of America's motion for stay, that this action must be arbitrated. *See Hicks*, 218 F. App'x at 746. This is the law of the case. *See Homans v. City of Albuquerque*, 366 F.3d 900, 904 (10th Cir. 2004) ("In general, the law of the case doctrine provides that when a court decides upon a rule of law, that decision should continue to govern the

> same issues in subsequent stages in the same case." (quotation omitted)).
>
> To the extent that all of defendants' objections to judicial estoppel were not before us in the prior appeal, we conclude, based on defendants' request for arbitration of the claims raised in the amended complaint, that they are judicially estopped from asserting that the arbitrator lacked jurisdiction over this appeal. *See New Hampshire v. Maine*, 532 U.S. 742, 749-51 (2000) (discussing judicial estoppel).

(App. A 11a-12a.) These reasons are sound.

Second, Petitioners clearly take a position now that is inconsistent with their prior position – they previously requested arbitration of the Phase II claims and now argue that there is no jurisdiction for the Arbitrator to hear the Phase II claims. The District Court explained:

> The refusal of Shaulis and Cadle to submit to the jurisdiction of the arbitrator is clearly inconsistent with the position they took earlier in their Joinder. They succeeded in persuading the Court to accept their position that the arbitration provision encompassed the claims against them; therefore, sustaining their inconsistent position before the arbitrator would create the perception that either the Court or the arbitrator have been misled.

(Aplt.App. 47.)[2] Moreover, Petitioner's prior position was not the result of inadvertence or mistake. Petitioners affirmatively filed a request that the District Court stay proceedings pending resolution of arbitration. (Aplee.Supp.App. 30-35.) Although Petitioners may now regret their decision, they cannot unwind it just because they lost the arbitration. The District Court and the Tenth Circuit appropriately applied judicial estoppel and/or law of the case here.

2. Respondents Were Bound By The Promissory Note.

Petitioners argue that compelling arbitration in this case violates the principles articulated in *Stolt-Nielsen* because (1) Mr. Cadle and Mr. Shaulis were never parties to the Arbitration Provision (Pet. 26-27); and (2) none of the Petitioners were parties when they engaged in the defamatory and outrageous conduct giving rise to Phase II (Pet. 25.)

The Petitioners' efforts to create a conflict between precedent addressing class arbitration and a case involving a promissory note, where every party was a holder, signatory, or agent of a holder or

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[2] Petitioners make reference to an attempt to later clarify their joinder. Once an objection to an arbitrator's jurisdiction is waived, however, it cannot be reasserted. *See Nghiem v. NEC Elecs., Inc.*, 25 F.3d 1437, 1440 (9th Cir. 1994) ("Once a claimant submits to the authority of the arbitrator and pursues arbitration, he cannot suddenly change his mind and assert lack of authority.").

signatory, strains credulity. As discussed above, each of the Petitioners voluntarily submitted to the jurisdiction of the Arbitrator for the Phase II claims by virtue of their affirmative efforts to compel arbitration of Mr. Hicks' Amended Complaint. Thus, whether any individual Petitioner was or is currently a party to the Promissory Note is of no consequence – they cannot now contest the jurisdiction of the Arbitrator. However, even if Petitioners were not judicially estopped from challenging arbitral jurisdiction, they are bound by the Arbitration Provision in the Promissory Note nonetheless.

Mr. Hicks and BOA became bound by the Note's broad Arbitration Provision when they executed the Note. Pursuant to the Note's express terms, the Arbitration Provision is binding upon BOA's successors. (Aplt.App. 110 ¶15.) Thus, TCC and Buckeye are bound by the Arbitration Provision as BOA's successors. Mr. Cadle and Mr. Shaulis are also bound by the Arbitration Provision in the Promissory Note as agents of TCC and Buckeye.[3] As the Tenth Circuit properly recognized (App. A 11a), "nonsignatories of arbitration agreements may be bound by the agreement to arbitrate under ordinary contract and agency principles." *Arnold v. Arnold Corp.*, 920 F.2d 1269, 1281 (6th Cir. 1990); *see also Pritzker v. Merrill Lynch, Pierce, Fenner & Smith*, 7 F.3d 1110, 1121 (3d

[3] It is uncontested that TCC and Buckeye were parties to the Promissory Note for some period of time, either directly or as alter egos of one another.

Cir. 1993). While it is true that both the cases cited by the Tenth Circuit involved an attempt by the non-signatory to compel arbitration of claims against it, the courts in those cases did not make the distinction Petitioners argue now – namely, that agency principles only bind agents to arbitration provisions when the agents seek to invoke arbitration. *Arnold* and *Pritzker* said no such thing.

The case Petitioners cite in the Petition does not reach this conclusion either. In *Bel-Ray Company v. Chemrite Limited*, 181 F.3d 435 (3d Cir. 1999), the court first recognized the general principle that, "[w]hen asked to enforce an arbitration agreement against a non-signatory, we ask whether he or she is bound by that agreement under traditional principles of contract and agency law." *Id.* at 444. The court then articulated the issue before it as "whether an employee or agent who did not agree to arbitrate can be compelled to arbitrate his personal liability on the basis of a commitment made by the corporation he serves." *Id.* at 445. The court ultimately concluded that, based on the facts before it, agency and contract principles did not bind the agent to the arbitration provision for determination of his personal liability. *Id.*

In contrast, Mr. Cadle and Mr. Shaulis were not compelled to arbitrate personal liability based solely on a commitment made by their corporate principal. Instead, Mr. Cadle and Mr. Shaulis themselves made the commitment to arbitrate. (Aplee.Supp.App. 30-35.) Moreover, Mr. Cadle and Mr. Shaulis can be

bound by traditional principles of contract and agency law.

Before the District Court entered its March 23, 2005 Order on arbitral jurisdiction, Petitioners, including Mr. Cadle and Mr. Shaulis individually, represented to the Court: "Hicks has failed to plead, nor can he show, that Mr. Shaulis and Mr. Cadle, if they performed any acts complained of by Hicks . . . , were performing such acts outside their representative capacity." (Aplt.App. 1164.) Thus, according to Petitioners, any acts Mr. Cadle and Mr. Shaulis performed were acts performed as agents of TCC and Buckeye and were subject to the Arbitration Provision. As a result, the District Court explained:

> Although Shaulis and Cadle were never parties to the promissory note containing the arbitration provision, the Court may determine whether that provision extends to them for acts performed in their capacity as officers or agents of The Cadle Company.
>
> * * *
>
> Although Plaintiff did not agree explicitly to arbitrate his claims against Shaulis and Cadle, he may not avoid the consequences of agreeing to arbitrate claims against The Cadle Company by naming them as parties for acts they may have taken as its agents. . . .

(Aplt.App. 46-49.) In confirming the Phase II Arbitration and rejecting Petitioners' jurisdictional challenges, the District Court quoted its March 23, 2005

Order. (App. B 34a-36a.) The Tenth Circuit further concluded:

> Also, defendants contend that Mr. Shaulis and Mr. Cadle were never parties to the note. While this is true, they joined the motion for a stay and requested that all claims be decided by arbitration. Also, under the circumstances presented here, the two are bound by the arbitration clause as agents of The Cadle Company and Buckeye.

(App. A 11a.) Based on the record, the District Court and the Tenth Circuit properly concluded that Mr. Cadle and Mr. Shaulis are bound by the Arbitration Provision as agents of TCC and Buckeye.

Moreover, all Petitioners are bound by the Arbitration Provision notwithstanding the timing of Petitioners' tortious acts. The Arbitration Provision begins: "Any controversy or claim between or among the parties hereto. . . ." (Aplt.App. 110 ¶15.) "Hereto" simply means "to this writing or document." *Webster's 3d New Int'l Dict.* 1059 (1993). Hence, the plain language of the Arbitration Provision places no temporal limit on when the parties have to be parties in order to invoke the Arbitration Provision. If it had been the intent of the parties to so limit the scope of the Arbitration Provision, it could have read: "Any controversy or claim between or among the current holder and borrower of this instrument. . . ." No such limitation exists. Indeed, as set forth *infra*, Section III(A), the Arbitration Provision survives assignment or payment in full of the Promissory Note.

3. The Arbitration Provision Encompasses the Phase II Claims.

Petitioners argue that the Tenth Circuit erred in affirming the District Court's confirmation of the Phase II Arbitration Award because, under *Stolt-Nielsen*, the parties never agreed to arbitrate this dispute. (Pet. 25.) Petitioners further assert that the Tenth Circuit erred in agreeing with the District Court that the Arbitrator properly permitted Mr. Hicks to amend his Statement of Claims to include additional facts he discovered after he filed his Statement of Claims but before the close of evidence in Phase II, arguing that Petitioners did not agree to arbitrate virtually identical future transgressions. (Pet. 30.)[4]

The instant case varies greatly from *Stolt-Nielsen*. In *Stolt-Nielsen*, the parties stipulated that their arbitration agreement was "silent" with respect to class arbitration and, more importantly, the parties agreed that "when a contract is silent on an issue there's been no agreement that has been reached on that issue." 130 S.Ct. at 1766. With these parameters,

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[4] Petitioners continue to state that, by granting Mr. Hicks' motion to conform the pleadings to the evidence, the Arbitrator permitted Mr. Hicks to add ***claims***. (Pet. 30.) To be clear, the amendment did not add any additional claims – the claims alleged were abuse of process, defamation, and outrageous conduct both before and after the amendment. (*Compare* Aplee.Supp.App. 1-21 *with* Aplt.App. 315-322.) Rather, the amendment allowed the Arbitrator to consider additional ***facts*** that had come to light since Mr. Hicks filed his Statement of Claims.

the parties submitted the question of whether class arbitration was permitted to a panel of three arbitrators. *Id.* at 1765. Thus, there was no opportunity for the arbitration panel in *Stolt-Nielsen* to interpret the arbitration provision and ascertain the parties' intent regarding class arbitration – the parties had already stipulated they had no intent. *Id.* at 1770. The particular language of the arbitration provision "was quite beside the point." *Id.* Ultimately, in reaching its conclusion that class arbitration was permitted, the arbitration panel ignored the arbitration provision altogether and imposed on the parties its view of sound policy. *Id.* at 1768-69.

Here, the parties do not agree about the scope of the Arbitration Provision.[5] In such case, the District Court had to interpret the language of the Arbitration Provision as it would any other contract to determine the parties' intent. *Stolt-Nielsen*, 130 S.Ct. at 1773-74. A review of the plain language of the Arbitration Provision makes clear that Petitioners expressly agreed to arbitrate the Phase II claims. Unlike *Stolt-Nielsen*, the Arbitration Provision is not silent about whether Mr. Hicks' tort claims were arbitrable. The Arbitration Provision provides, in relevant part: "Any

[5] Petitioners continue to argue that Mr. Hicks agreed the Phase II claims were not arbitrable because Mr. Hicks initially made certain unsuccessful legal arguments regarding whether his tort claims should be arbitrated. (*See, e.g.*, Pet. 25.) Mr. Hicks lost those arguments. The District Court sided with Petitioners and determined the claims were arbitrable. This is the law of the case. *Arizona*, 460 U.S. at 618.

controversy or claim between or among the parties hereto including but not limited to those arising out of or relating to this instrument . . . including any claim based on or arising from an alleged tort, shall be determined by binding arbitration. . . ." (Aplt.App. 110 ¶15.) Thus, the parties expressly agreed to arbitrate ***any controversy or claim between them*** **including,** ***but not limited to***, claims arising out of the Note and claims arising from tort.

The lower courts reasonably interpreted the broad Arbitration Provision to cover Mr. Hicks' Phase II claims against Petitioners, which were tort claims for defamation and outrageous conduct. Both claims were based on Petitioners' relentless allegations that Mr. Hicks engaged in bank fraud in relation to the Promissory Note and/or perjury regarding his alleged bank fraud. As the Tenth Circuit reasoned: "The assertion that Mr. Hicks committed perjury by arguing that he did not commit bank fraud directly relates to the issues in arbitration and therefore was within the arbitrator's authority to arbitrate." (App. A 13a.) Thus, the Phase II claims are tort claims that relate to and arise out of the Note. They are expressly covered by the Arbitration Provision.

Moreover, the Arbitrator's decision to permit Mr. Hicks to amend his Statement of Claims to conform to the evidence presented at the hearing was a procedural decision well within his discretion and does not alter the parties' arbitration agreement. This Court explained:

> In certain contexts, it is appropriate to presume that parties that enter into an arbitration agreement implicitly authorize the arbitrator to adopt such procedures as are necessary to give effect to the parties' agreement. Thus, we have said that "'"procedural" questions which grow out of the dispute and bear on its final disposition' are presumptively not for the judge, but for an arbitrator, to decide."

Stolt-Nielsen, 130 S.Ct. at 1775 (quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002) (quoting *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557 (1964))). As the Court determined, inferring authority for class arbitration into an arbitration provision otherwise silent on the issue fundamentally changes the nature of the arbitration in such a way that the parties cannot be presumed to have consented simply by entering into an arbitration agreement. *Stolt-Nielsen*, 130 S.Ct. at 1775-76. Given the major differences between bilateral and class arbitration, the decision of the arbitration panel in *Stolt Nielsen* ***substantively*** altered the parties' agreement to arbitrate. *Id.*

In stark contrast, the parties here expressly agreed to arbitrate tort claims between them related to the note. (Aplt.App. 110 ¶17.) By permitting the amendment to conform to the evidence, the Arbitrator made a purely procedural determination that fell well within his discretion. The Arbitrator merely accepted for consideration additional post-demand facts that lend further support to the tort claims the parties

agreed to arbitrate. His decision does not fundamentally change the nature of the arbitration. Citing the same cases this Court quoted in *Stolt-Nielsen*, the Tenth Circuit astutely recognized this distinction and held: "The arbitrator had discretion to allow Mr. Hicks to amend his statement of claims to conform to the evidence." (App. A 12a-13a.) Accordingly, the Arbitrator had jurisdiction to consider the additional facts in support of Mr. Hicks' claims.

Stolt-Nielsen did not create new law. Even so, the Tenth Circuit's decision does not conflict with *Stolt-Nielsen* or the long-established precedent that arbitration is consensual. This Court should deny the Petition.

III. THE TENTH CIRCUIT DID NOT DISREGARD *LITTON*.

Petitioners argue that this Court should grant their Petition because the Tenth Circuit allegedly disregarded the postexpiration arbitration jurisdiction analysis set forth in *Litton Financial Printing Division v. NLRB*, 501 U.S. 190 (1991). First, the Tenth Circuit did not even need to reach a *Litton* analysis because the Promissory Note in issue and its attendant Arbitration Provision did not "expire." The Arbitration Provision in the Promissory Note survives and properly subjects Petitioners to arbitral jurisdiction. Second, while the Tenth Circuit did not analyze each of the *Litton* factors, it nonetheless applied the *Litton* analysis in upholding arbitral jurisdiction in

this case. At most, however, these assertions of error amount to an argument that the Tenth Circuit misapplied a properly stated rule of law. That does not provide a basis for this Court's review. S. Ct. R. 10. Accordingly, the Petition should be denied.

A. *Litton* Does Not Apply Because This Is Not A Postexpiration Case.

The Note's arbitration provision is very broad and includes "any controversy or claim . . . including but not limited to those arising out of or relating to this instrument, including any claim based on or arising from an alleged tort. . . ." (Aplt.App. 110 ¶17.) It cannot be disputed that the Phase II claims, which concerned Petitioners' lodging of defamatory criminal allegations against Mr. Hicks regarding his alleged obligations under the Note, concern "any controversy . . . arising out of or relating" to the Note. *See Local 5-857 Paper, Allied-Indus., Chem. & Energy Workers Int'l Union v. Conoco*, 320 F.2d 1123, 1126 (10th Cir. 2003) (finding that where there is a "broad arbitration clause" that unless there is an "express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail" (internal quotations omitted)). Arbiters Hinga and Dubofsky expressly found that the malicious letter writing campaign was part of the collection activities in which Petitioners have engaged. (Aplt.App. 55; App. C 69a.) In finding that the Arbitration Provision

covered the Phase II claims, the District Court explained:

> Although The Cadle Company no longer holds the Note, the arbitration provision survives the expiration of the Note, and the parties' dispute concerning Plaintiff's liability on the Note and Defendants' efforts to collect on it was the genesis of, and is factually intertwined with, Defendants' letter-writing campaign against Plaintiff which is the subject of Plaintiff's tort claims.

(App. B 37a.)

The Promissory Note at issue here and the collective bargaining agreements ("CBAs") at issue in *Litton* and its progeny are very different contracts. The CBAs expire by their express terms – they are only valid contracts until a fixed date after which they have no effect whatsoever.

In contrast, the Promissory Note does not have a provision whereby it expires, thus relieving all parties of their obligations. (*See* Aplt.App. 107-11.) Rather, the Note's provisions, by their very terms, continue to apply to the future tortious conduct.[6] Parties seeking to avoid such an expansive provision may: (1) not buy the Note; or (2) refrain from

---

[6] Petitioners claim that the operative portions of the Note confirm that Mr. Hicks committed bank fraud and support the alleged truth of their allegations to numerous governmental authorities and law enforcement agencies.

committing tortious acts that have their genesis in the Note. But, if one buys the Note and is steadfastly determined to commit torts against other parties to the Note, one cannot avoid the expansive agreement to arbitrate. Selling the Note is not equivalent to expiration. The terms of the Note do not relieve past holders of the obligation to arbitrate.

Thus, this is not a postexpiration case to which *Litton*'s limitations apply. The Tenth Circuit recognized as much because it did not rely heavily on *Litton* in reaching its conclusion that the dispute was arbitrable.

B. Even Assuming *Litton* Applies, The Dispute Is Arbitrable.

Even assuming the Promissory Note "expired" when Mr. Hicks was relieved of liability and/or when Petitioners sold the Note back to BOA, the Tenth Circuit properly applied the *Litton* test to uphold arbitral jurisdiction. The Tenth Circuit was aware of and even cited to *Litton* in its Order and Judgment, acknowledging the general presumption that all doubts are resolved in favor of arbitrability. (App. A 9a (citing *Litton*, 501 U.S. at 209).) The Tenth Circuit further endorsed this Court's rationale as stated in *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643 (1986), that when an agreement contains a broad arbitration clause, there is a presumption of arbitrability – an order to arbitrate should not be denied unless "it may be said with positive

assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." (App. A 9a (quoting *AT&T Techs.*, 475 U.S. at 650).)

In *Nolde Brothers, Inc. v. Bakery Workers*, 430 U.S. 243, 255 (1977), this Court also found a presumption in favor of postexpiration arbitration unless "negated expressly or by clear implication." Recognizing that the *Nolde Brothers* presumption "is limited to disputes arising under the contract," the Court explained when a postexpiration grievance could be said to arise under the collective bargaining agreement:

> [1.] where it involves facts and occurrences that arose before expiration, [2.] where an action taken after expiration infringes a right that accrued or vested under the agreement, or [3.] where, under normal principles of contract interpretation, the disputed contractual right survives expiration of the remainder of the agreement.

Litton, 501 U.S. at 206.

In affirming the District Court, the Tenth Circuit found that the dispute here arose from actions "directly tied to the note." (App. A 10a.) The Tenth Circuit explained that the Petitioners' "continuous course of wrongful conduct was so related to the Note that resolution of the issue of Petitioners' liability for the claims asserted could not be determined independent of the Note." (*Id.*) This is exactly the analysis

Litton requires. 501 U.S. at 205-06. To assert that the Tenth Circuit did not apply the proper rule of law merely because the opinion did not walk step-by-step through each of the three *Litton* factors ignores the Tenth Circuit's rationale and elevates form over substance.

Analyzing the *Litton* factors confirms that the Phase II claims were properly subject to arbitration in this case. As to the first factor, the Phase II claims "involve[] facts and occurrences that arose before expiration." *Litton*, 501 U.S. at 206. Petitioners contend that the underlying transaction involved bank fraud. That underlying transaction occurred before Petitioners sold the Note.

As to the second factor, Mr. Hicks had a right to be free from unfounded and malicious allegations of bank fraud at the time he signed the Note.[7] The actions taken by Petitioners after they sold the Note infringed upon that right. As Judge Dubofsky found:

> I find that there was no bank fraud in this case.
>
> * * *
>
> Because Hicks did not commit bank fraud, and since I found that none of his statements constitute perjury, the contention of the

[7] Petitioners alleged that Mr. Hicks engaged in bank fraud regarding his obligations under the Promissory Note and that Mr. Hicks committed perjury by lying about committing bank fraud

> [Petitioners] that Hicks committed the crime of perjury are also defamatory.
>
> * * *
>
> I conclude that [Petitioners] did not have either a reasonable objective basis or subjective belief in the truth of the allegations of bank fraud or perjury.

(App. A 60a, 67a, 76a-77a.)

As to the final factor, there is no expiration date. As discussed *supra*, Section III(A), under normal principles of contract interpretation, a party cannot buy the Note, commit torts based upon the note, and then claim that the Arbitration Provision does not bind it.

Even if the Tenth Circuit erred in its application of *Litton*, however, such an error would not justify this Court's grant of certiorari. Misapplication of a properly stated rule of law rarely warrants Supreme Court review, particularly in a case such as this where the facts and circumstances so clearly support arbitral jurisdiction on numerous grounds. Sup. Ct. R. 10.

IV. THERE IS NO CIRCUIT SPLIT REGARDING APPLICATION OF THE *LITTON* TEST.

Petitioners argue that this Court should grant their Petition because supposedly there is a circuit split among the United States courts of appeals

regarding application of the post-expiration arbitration jurisdiction test outlined in *Litton*. 501 U.S. at 205-06. Analysis of these cases, however, reveals they are consistent with one another and with *Litton*. The *Litton* test is a fact-intensive test that focuses on pre-expiration conduct. The decisions by the Sixth, Eighth, and Ninth Circuits applying *Litton* recognize and apply that fundamental tenet. There is no circuit split here for the Court to resolve.

Furthermore, even if there was a split among the circuits in the context of their review of pre-expiration conduct in a collective bargaining agreement case, a case involving a promissory note that contains no expiration provision is not an appropriate case to further develop and refine the body of law governing CBAs.

In *Trinidad Corp. v. National Maritime Union of America*, 81 F.3d 769 (8th Cir. 1996), the Eighth Circuit determined whether grievances filed after the expiration of a collective bargaining agreement were subject to the agreement's arbitration clause. In so doing, the Eighth Circuit acknowledged and applied *Litton*. *Id.* at 772-73. Because no one argued that the right to arbitrate vested under the agreement and because the agreement did not explicitly provide that its arbitration provision survived expiration, the court limited its *Litton* inquiry to "determining whether any of the facts and circumstances leading to the relevant grievances arose before termination." *Id.* at 773. The parties agreed that the facts underlying two of the grievances arose after the expiration date.

The Eighth Circuit determined those claims were not arbitrable. *Id.* The parties disagreed, however, as to when the facts underlying the other two grievances arose. The Eighth Circuit concluded it could not make that determination based upon the record before it and remanded to the district court to conduct the factual inquiry necessary to resolve the case. *Id.* The Eighth Circuit gave the following instruction: "If the ***relevant*** events occurred before expiration, then the grievances arose under the agreement and are subject to arbitration." *Id.* (emphasis added).

The Eighth Circuit's holding cannot be read as expansively as Petitioners would suggest. (Pet. 19.) The Eighth Circuit's instruction makes sense – events irrelevant to the dispute should not affect whether the dispute is arbitrable. Thus, the Court must determine that relevant events underlying the dispute occurred before expiration. This decision comports entirely with *Litton's* requirement that the post-expiration dispute involve facts and occurrences that arose before expiration. *Litton*, 501 U.S. at 206. The gloss of "relevancy" is implicit in this Court's decision – the Eighth Circuit did not alter *Litton*.

In *South Central Power Co. v. International Brotherhood of Electrical Workers*, 186 F.3d 733 (6th Cir. 1999), the Sixth Circuit evaluated the arbitrability of a grievance filed after expiration of a collective bargaining agreement, where some of the facts and occurrences underlying the grievance arose before expiration and some arose after. In light of this

Court's holdings in *Nolde Brothers* and *Litton*, the Sixth Circuit astutely drew the following conclusions:

> (1) If all the facts and occurrences relating to [employee's] termination had arisen prior to the expiration of the Old Agreement, then the parties would be bound to arbitrate, and (2) if none of the facts and occurrences had arisen prior to the expiration of the Old Agreement . . . then arbitration would clearly not be required.

Id. at 739. While true, neither conclusion resolved the issue before the Sixth Circuit. Thus, the court had to engage in the fact-intensive inquiry required by *Litton* before determining whether the grievance was subject to arbitration.

The court rejected South Central's argument that the ***only*** relevant consideration was when the employee was actually terminated and instead recognized that *Litton* "requires a consideration of 'facts and occurrences' beyond the ultimate fact of discharge." *Id.* The court further rejected the Union's interpretation of *Trinidad*, explaining that "[t]o the extent that the Eighth Circuit meant for the term 'any' to reflect the controlling legal standard, we decline to adopt the analysis. . . ." *Id.* at 740. Of course, *Trinidad's* instruction to the trial court was to determine whether the ***relevant facts*** occurred before expiration – not whether ***any fact*** occurred before expiration. Ultimately, the Sixth Circuit determined that a dispute arises under a contract for purposes of postexpiration arbitration "when a ***majority*** of the

material facts and occurrences arose before the expiration of the collective bargaining agreement," but then the court recognized, "[b]ecause these cases are predominately factual in nature, this will necessarily be a case-by-case determination." *Id.* Thus, just like the Eighth Circuit, the Sixth Circuit recognized the fact-intensive inquiry required and the impropriety of adopting a bright line rule under *Litton*.

In *Operating Engineers Local Union No. 3 v. Newmont Mining Corp.*, 476 F.3d 690 (9th Cir. 2007), the Ninth Circuit dealt with a very specific arbitration provision and whether a postexpiration grievance should be arbitrated. The employee falsified a tool request prior to expiration of the CBA but was terminated after the expiration of the CBA. *Id.* at 692. The arbitration provision provided, in relevant part: "[T]he Arbitrator shall determine the question of fact as to the occurrence or non-occurrence of the circumstances upon which the discipline was based." *Id.* The Ninth Circuit did not believe a mere counting of facts and occurrences (or a weighing of the relative importance of pre- and postexpiration facts) was what the *Litton* test required. Instead, the court determined that "the dispute must be arbitrated if the parties agreed to arbitrate those facts or occurrences." *Id.* at 693.

Of course, in the context of the narrow arbitration provision in issue, the Ninth Circuit's conclusion makes perfect sense. The employee's falsification of the tool request and its consequences are "question[s] of fact as to the occurrence or non-occurrence

of the circumstances upon which the discipline was based." *Id.* But, despite its attempt to eschew qualitative evaluation of the facts, the Ninth Circuit explained: "There is no doubt that the alleged falsification is of ***some significance*** in the termination dispute; indeed, it is the primary factual question to be resolved." *Id.* (emphasis added). The court continued: "Even if the termination was a significant part of the dispute, so was the alleged misconduct in falsifying the tool request form. The parties clearly agreed in the CBA to arbitrate the latter issue, and the misconduct occurred, if at all, prior to the expiration of the CBA." *Id.* at 694. Ultimately, important facts giving rise to the dispute occurred before the agreement expired. The Ninth Circuit's conclusion is consistent with the Eighth and Sixth Circuits.

The differences between these courts' interpretations of *Litton* are minor. One case finds that the "relevant" facts are important, while another case finds that the "material" facts are important, while the last case finds that the pre-expiration facts must be of "some significance" but ultimately the dispute should be arbitrated if the parties agreed to arbitrate the facts and circumstances involved. Each of the circuit courts properly recognized the highly fact-sensitive nature of the *Litton* test and applied it to the facts and circumstances before it. There is no split among the circuits for this Court to resolve. The Petition should be denied.

CONCLUSION

Pursuant to Supreme Court Rule 10, this case does not present any "compelling reason" for this Court to grant the Petition for Writ of Certiorari. The Tenth Circuit's decision accords with the long-standing precedent regarding arbitral jurisdiction that this Court recently rearticulated in *Stolt-Nielsen*. Moreover, to the extent *Litton* even applies to this case, which involves a promissory note lacking an expiration provision, the Tenth Circuit's decision properly applied *Litton*. Finally, there is no circuit split regarding application of *Litton* for this Court to resolve. Mr. Hicks respectfully requests the Court deny the Petition for Writ of Certiorari.

Respectfully submitted this 8th day of July, 2010.

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IN THE

Supreme Court of the United States

THE CADLE COMPANY, *et al.*,

Petitioners,

v.

KERRY R. HICKS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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"[A]rbitration 'is a matter of consent, not coercion.'" *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S.Ct. 1758, 1773 (2010) (citation omitted). Consistent with this fundamental principle, a dispute arising after termination of a contract with an arbitration clause is arbitrable "only where [that] dispute has its real source in the contract." *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 205 (1991). Lower courts have struggled to apply this precedent, however, and in the decision below, the Court of Appeals disregarded it. As a result, Petitioners were forced to arbitrate a dispute that neither they, nor Respondent Kerry Hicks, agreed to arbitrate. In attempting to shift attention away from the lower court's error, and to minimize the importance of this issue, Respondent mischaracterizes the record and the law. Petitioners respectfully submit that this Court should grant certiorari.

I. The Tenth Circuit's Failure to Apply *Litton* Warrants Review.

Respondent waits until the end of his Brief in Opposition (BIO) to address *Litton*, and his arguments are untenable.

A. This Is a Postexpiration Case.

Respondent first claims that this is not a postexpiration case, which means *Litton* does not apply. *See* BIO 30-32. This argument, which Respondent makes for the first time to this Court, is refuted by the record.

The arbitration clause at issue expressly limits its applicability to controversies or claims "between or among the parties hereto." (Aplt. App. 110 ¶17; Aplt. App. 119 ¶15) (capitalization omitted); *see also*

id. (referring to "any party to this instrument"); Petition for Certiorari ("Pet.") 5 (quoting the Promissory Note's arbitration clause). Respondent alternatively omits the "parties hereto" limitation when quoting the arbitration clause, *see* BIO 30, or makes the remarkable assertion that it imposes "no temporal limit on when the parties have to be parties in order to invoke the Arbitration Provision." BIO 24; *see also* BIO 31-32. But the clause says that arbitration is required of "parties hereto," not of any party who "was or is currently a party to the Promissory Note," as Respondent would prefer. *See* BIO 21. It is axiomatic that, when parties terminate their contractual relationship as they did here, the obligations the contract imposed ordinarily terminate as well. *See, e.g.*, *Litton*, 501 U.S. at 207. And, contrary to Respondent's perplexing suggestion, *see* BIO 31, 35, 36, contracts may of course be terminated through means other than the expiration dates commonly found in collective bargaining agreements.

Respondent previously recognized these settled principles. In resisting arbitration of the claims now at issue (the Arbitration II claims), Respondent stated:

> [The arbitration] provision includes all claims arising while the plaintiff and defendant were "parties hereto," *i.e.*, as long as one of the parties was the maker and the other a holder of the note. . . . To hold otherwise would render the arbitration provision absurdly overbroad. It would mean that Mr. Hicks is forever bound to arbitrate any and all claims

> that arise between him and [Petitioners] in perpetuity.

(Aple. Supp. App. 46).

Even after Respondent switched positions with respect to arbitrability, Respondent continued to recognize that the Arbitration II claims arose postexpiration. He argued that the claims were nonetheless arbitrable based on an asserted presumption in favor of postexpiration arbitrability. *See* Answer and Cross-Appeal Brief of Kerry R. Hicks at 35. The courts below likewise recognized that this is a postexpiration case, finding the Arbitration II claims arbitrable based on that same presumption. *See* App. 10a-11a (Court of Appeals); 37a (district court).

B. The Tenth Circuit Disregarded *Litton*.

Because this is a postexpiration case, it is governed by *Litton*, which holds that the presumption in favor of postexpiration arbitrability "appl[ies] *only* where a dispute has its real source in the contract." *Litton*, 501 U.S. at 205 (emphasis added). As just discussed, the courts below relied on a presumption in favor of postexpiration arbitrability, but they did so without acknowledging, much less applying, *Litton*'s three-part test for determining whether a postexpiration dispute has its real source in the contract.

Respondent asserts that the Tenth Circuit concluded *Litton* was inapplicable here, and acknowledges that "the Tenth Circuit did not analyze each of the *Litton* factors." BIO 29, 32. Nonetheless, Respondent also claims that the Tenth Circuit

performed the "exact[] analysis" required by *Litton*. BIO 33. Respondent is clearly incorrect.[1]

First, Respondent misrepresents what the Tenth Circuit said. The italicized language in the following sentence from Respondent's brief does not appear in the decision below: "The Tenth Circuit explained that the Petitioners' 'continuous course of wrongful conduct *was so related to the Note that resolution of the issue of Petitioners' liability for the claims asserted could not be determined independent of the Note.*'" BIO 33 (misquoting App. 10a) (emphasis added).

The Tenth Circuit did state that the postexpiration dispute in this case was "'directly tied to the note,'" BIO 33. This unsupported statement is, however, not a substitute for the three-part *Litton* analysis.

Under the first *Litton* factor, the Arbitration II claims are not arbitrable because those claims are not based on events or occurrences that happened during the contractual relationship between Respondent and one of the Petitioners. *Litton*, 501 U.S. at 206. Rather, those claims are based on subsequent letters written by Petitioner William Shaulis ("the Shaulis letters"), which suggested Mr. Hicks may have committed bank fraud when he entered into the Promissory Note with Bank of America. *See* Pet. 7-8, 16. As Respondent has previously recognized, his

[1] Respondent emphasizes that the Tenth Circuit "even cited to *Litton*," but, as Respondent must acknowledge, the Tenth Circuit did so only with respect to a general background principle. *See* BIO 32; App. 9a.

Arbitration II claims "arose independent of the Note," and the parties did not agree to arbitrate them. (Aplt. App. 296); (Aple. Supp. App. 43-48).

Respondent now claims that the first *Litton* factor permits arbitration because the Shaulis letters referenced an event that occurred prior to the end (indeed prior to the beginning) of the contractual relationship between Respondent and one of the Petitioners. *See* BIO 34. But *Litton* plainly does not allow postexpiration arbitration whenever a party makes reference to something that occurred preexpiration. *See Litton*, 501 U.S. at 209-10 (holding that a postexpiration dispute was not arbitrable where the union, in arguing in favor of arbitrability, referenced events that occurred preexpiration). Rather, the question under *Litton* is whether the postexpiration dispute "has its real source in the contract" between the parties. *Litton*, 501 U.S. at 205. Here, Respondent's claims based on the Shaulis letters have nothing to do with the parties' prior contractual relationship—Mr. Shaulis could have written the very same letters and Mr. Hicks could have brought the very same claims if the parties never had a contractual relationship.

Under the second *Litton* factor, the Arbitration II claims are not arbitrable because they are based on alleged torts arising out of the Shaulis letters, and not on "a right that accrued or vested under the agreement," *Litton*, 501 U.S. at 206. *See* Pet. 17. Respondent argues that the second factor permits arbitration because "Mr. Hicks had a right to be free from unfounded and malicious allegations of bank fraud at the time he signed the Note." BIO 34. But as Respondent's own description of that right makes

clear, it is not a contractual one, much less one that accrued during the contractual relationship between Respondent and one of the Petitioners.

Finally, under the third *Litton* factor, the Arbitration II claims are not arbitrable because they do not implicate a disputed contractual right that "under normal principles of contract interpretation . . . survives expiration of the remainder of the agreement," *Litton*, 501 U.S. at 206. *See* Pet. 17-18. Respondent claims otherwise only by repeating his meritless argument that the Note imposed a perpetual obligation to arbitrate. *Compare* BIO 35 *with* Part I.A, *supra*.

In sum, this is not a case where the Court of Appeals "[m]isappli[ed] a properly stated rule of law," BIO 35. It is a case where that court failed to recognize the controlling rule of law on an important federal issue. Certiorari is therefore warranted. Sup. Ct. R. 10(c); *see* Pet. 18, 31-32.

C. The Circuits Are Split About How to Apply *Litton*.

Respondent boldly claims "there is no circuit split regarding application of the *Litton* test." BIO 35 (capitalization omitted). But the sharp split discussed in the Petition, *see* Pet. 18-22, has been recognized by the courts of appeals themselves.

After the Eighth Circuit interpreted the first *Litton* prong to mean "our inquiry is limited to determining whether any of the facts and circumstances leading to the relevant grievances arose before termination," *Trinidad Corp. v. Nat'l Maritime Union of Am.*, 81 F.3d 769, 773 (8th Cir. 1996), the Sixth Circuit considered and rejected "the

holding in *Trinidad*." *South Central Power Co. v. Int'l Bhd. of Elec. Workers, Local Union 2359*, 186 F.3d 733, 740 (6th Cir. 1999). The Sixth Circuit instead held that the issue is whether "a majority of the material facts and occurrences arose before the expiration of" the contract. *Id.*[2] The Ninth Circuit, in turn, considered and expressly rejected the Sixth Circuit's approach. *See Operating Eng'rs Local Union No. 3 v. Newmont Mining Corp.*, 476 F.3d 690, 693 (9th Cir. 2007). The Ninth Circuit held that poststexpiration disputes could be arbitrable so long as the "preexpiration facts or occurrences [are] of *some* significance in the dispute." *Id.*

Respondent argues these decisions are "fact-sensitive." BIO 40; *see also* BIO 36-39. But the circuit split is not about facts, it is about three sharply different legal tests for assessing the facts. And, contrary to Respondent's assertion, *see* BIO 36, the fact that the underlying contract here is not a collective bargaining agreement creates no vehicle problem. *See Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. ___ (2010), slip op. at 8 n.6 (noting that "precedents applying the FAA [Federal Arbitration Act] . . . employ the same rules of arbitrability that govern labor cases"). This Court should grant certiorari to resolve the division among

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[2] It is of course true that *Trinidad* examines whether any relevant fact (as opposed to any irrelevant fact) occurred preexpiration, *see* BIO 37, 38, but that does not minimize the difference between *Trinidad* and *South Central*, which examines whether a majority of the material facts occurred preexpiration.

the circuits on this important issue. *See* Sup. Ct. R. 10(a); Pet. 18-22, 31-32.

II. The Conflict Between the Decision Below and *Stolt-Nielsen* Also Warrants Review.

The conflict between the decision below and this Court's recent decision in *Stolt-Nielsen* provides an additional reason to grant merits review, or to grant certiorari, vacate the judgment below, and remand for further proceedings (GVR). *See* Pet. 22-30. Respondent's contrary arguments, *see* BIO 12-29, are once again unavailing.

A. Respondent Misapprehends the Significance of *Stolt-Nielsen*.

Stolt-Nielsen forcefully reaffirms the "foundational FAA principle that arbitration is a matter of consent." *Stolt-Nielsen*, 130 S.Ct. at 1775. As Respondent emphasizes, the Tenth Circuit said that it recognized this principle. *See* BIO 13. But, in two respects, the Court of Appeals clearly failed to *apply* this principle consistently with *Stolt-Nielsen*.

First, the Tenth Circuit enforced mandatory arbitration even though Respondent acknowledged that he "never agreed to arbitrate" the Arbitration II claims. (Aple. Supp. App. 48); *see* Pet. 16. Under *Stolt-Nielsen*, courts may not require arbitration when the parties acknowledge they had not agreed to it. *See* 130 S.Ct. at 1770, 1776 & n.10; Pet. 25.[3]

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[3] And, notwithstanding Respondent's incorrect judicial estoppel argument, Petitioners did not consent to arbitrate any claims beyond the

Second, *Stolt-Nielsen* holds that "parties may specify *with whom* they choose to arbitrate their disputes." 130 S.Ct. at 1774; *see also id.* ("'Nothing in the FAA authorizes a court to compel arbitration . . . *by any parties* . . . that are not already covered in the agreement.'") (citation and brackets omitted). The decision below conflicts with this holding, because the arbitration agreement in the Promissory Note was limited to existing parties to that Note, yet the Tenth Circuit reflexively and erroneously applied a presumption in favor of postexpiration arbitrability. As a result, the decision below also contravened this Court's even more recent decision in *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. ___ (2010). In *Granite Rock*, the Court held that general presumptions in favor of arbitrability cannot be relied upon to require arbitration of disputes that the parties did not agree to arbitrate. *See* 561 U.S. ___, slip op. at 12-13. The Court further explained: "[f]or purposes of determining arbitrability, *when* a contract is formed can be as critical as *whether* it was formed." *Id.* at 13-14. Consistent with these principles, parties cannot be required to arbitrate a dispute that arises *prior* to the formation of a valid arbitration agreement, *see id.* at 14-15, or *after* termination of such an agreement (unless the dispute has its real source in the contract containing that agreement).

Moreover, *Stolt-Nielsen* makes clear that the arbitrator in this case lacked jurisdiction over the individual Petitioners, Daniel Cadle and William Shaulis, for an additional reason. Even if Messrs.

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requirements of the arbitration agreement. *See* Part II.B, *infra*; *see also* Pet. 8-9.

Cadle and Shaulis were agents of The Cadle Company and Buckeye Retirement Co., LLC, Ltd., *see* BIO 23, they were never parties to the Note, *see* Pet. 26. Therefore, "there is [no] contractual basis for concluding that [they] *agreed*" to arbitrate their personal liability, *Stolt-Nielsen*, 130 S.Ct. at 1775. *See* Pet. 26-27. Respondent reaches a contrary conclusion through the same inverted agency analysis employed by the decision below. *See* BIO 21-24. As the Third Circuit explained in a decision Respondent ignores, there is a dispositive distinction between the cases relied on by Respondent, which involved "nonsignatory agents who sought to *invoke* an arbitration agreement entered into by their corporate principal," and cases such as this one, which involve "nonsignatory agents who [seek] to *avoid* their principal's agreement to arbitrate." *Trancinda Corp. v. DaimlerChrysler AG*, 502 F.3d 212, 224 (3d Cir. 2007) (comparing, *inter alia*, *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110 (3d Cir. 1993) with *Bel-Ray Co., Inc. v. Chemrite, Ltd.*, 181 F.3d 435 (3d Cir. 1999)).

Because of the clear conflict between the decision below and both *Stolt-Nielsen* and *Granite Rock*, this Court should grant review or GVR.

B. Respondent's Judicial Estoppel Argument Is Based on a False Premise.

This Court's decision in *New Hampshire v. Maine*, 532 U.S. 742 (2001), does not support a finding of judicial estoppel in this case. *See* Pet. 28-29. Perhaps recognizing as much, Respondent emphasizes that *New Hampshire* indicates that additional fact patterns might also warrant judicial estoppel. *See* BIO 17. Even under Respondent's

theory, however, judicial estoppel is inapplicable because this case does not involve the "unfair advantage [or] unfair detriment" alleged by Respondent. BIO 17.

The sole basis for Respondent's judicial estoppel argument is that, in January 2005, Petitioners joined a motion by Bank of America to stay (not dismiss) Respondent's suit which, at the time, included both postexpiration and preexpiration claims, *see* Pet. 7-8. While a single sentence in Petitioners' joinder motion did state that the arbitration clause in the Promissory Note encompassed all of Respondent's claims, *see* BIO 14, Petitioners never consented to arbitrate any claims not covered by that arbitration clause. (Aple. Supp. App. 30-34.) Moreover, the very next month—and well before Arbitration II proceedings began—Petitioners expressly clarified they had not intended to consent to the arbitrator's jurisdiction through the joinder motion; when Petitioners were nonetheless required to arbitrate, they vigorously contested the arbitrator's jurisdiction. *See* Pet. 9, 29. Thus, this is simply not a case where Petitioners are attempting to "unwind [a request for arbitration] because they lost the arbitration." BIO 20.[4]

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[4] For the same reason, Respondent's waiver argument, *see* BIO 20 n.2, fails. Waiver is found only when a party participates extensively in the merits of an arbitration before objecting. *See Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1279 (9th Cir. 2006) (en banc) (distinguishing *Nghiem v. NEC Elecs., Inc.*, 25 F.3d 1437, 1440 (9th Cir. 1994)).

Even worse, Petitioners were required to arbitrate additional claims that Respondent did not raise until October 2006, which Petitioners could not have consented to arbitrate through their January 2005 joinder motion. *See* Pet. 29-30. Respondent contends the arbitrator only considered new facts in support of Respondent's existing claims, and that the arbitrator had the discretion to make this "purely procedural determination." *See* BIO 25 n.4, 28-29. But Respondent fails to recognize that a "claim" is simply "[t]he aggregate of operative facts giving rise to a[n enforceable] right." Black's Law Dictionary 240 (7th ed. 1999); *accord Hudson River Sloop Clearwater, Inc. v. Dep't of the Navy*, 891 F.2d 414, 418 (2d Cir. 1989). The new allegations Respondent made in October 2006 raised substantial, new operative facts (e.g. alleging, for the first time, that Petitioners defamed Mr. Hicks by making a false allegation of perjury, *see* Pet. 30), and hence constituted new claims. Amending a statement of claims may be a procedural question in many circumstances, but where, as here, it fundamentally changes the nature of the arbitration, it is impermissible absent the parties' consent. *See Stolt-Nielsen*, 130 S.Ct. at 1775, 1776; Pet. 30.

Finally, Respondent also appears to make a law-of-the-case argument in support of judicial estoppel. *See* BIO 15, 20. But "the doctrine of law of the case limits reexamination of a ruling in an earlier stage of a litigation by the same court, not by a higher court." *In re: South Beach Securities*, 606 F.3d 366, 378 (7th Cir. 2010) (Posner, J.) (citing, *inter alia*, *Lujan v. Nat'l Wildlife Federation*, 497 U.S. 871, 881 n.1 (1990)).

For the foregoing reasons, Respondent's effort to defend the involuntary arbitration imposed on Petitioners through a theory of judicial estoppel fails.

III. Conclusion

Petitioners respectfully request that the writ of certiorari be granted.

Respectfully submitted,

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